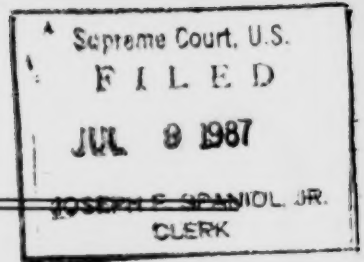


87 - 7 3

No.



In The
Supreme Court of the United States
October Term, 1986

Katherine B. NICHOLS, etc.,

Petitioners,

v.

Don RYSAVY, *et al.*,

Respondents.

(See List of Parties)

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

KIM JEROME GOTTSCHALK
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Petitioners

July 1987

1380



QUESTIONS PRESENTED

Purporting to act pursuant to the Burke Act, 25 U.S.C. § 349, the Secretary of the Interior, between 1917 and 1920, issued thousands of fee patents to Indian allottees prior to the expiration of the allotment trust period. These fee patents were issued without applications therefore by the allottees and without a determination of each allottee's competency to manage his or her own affairs. Thousands of Indians lost their allotments to third parties because they were not in fact competent to manage their own affairs.

Is the United States an indispensable party to an action pursuant to 25 U.S.C. § 345 to recover an allotment from third parties?

Is a fee patent forced on an allottee without individually determining the allottee's competency to manage his or her own affairs void as beyond the authority granted to the Secretary of the Interior by the Burke Act, 25 U.S.C. § 349?

Does either 28 U.S.C. § 2401(a) or 25 U.S.C. § 347 bar these actions to recover allotments?

List of Parties

Katherine B. NICHOLS, etc., Petitioners,	Mary H. PRITZKAU, etc., Petitioners,
v. Don RYSAVY, et al., Respondents,	v. Helen LARSON, et al., Respondents,
Clover POTTER, etc., Petitioners,	Elsie BONSER, etc., Petitioners,
v. STATE OF SOUTH DAKOTA, et al., Respondents,	v. Ruth SHELBOURN, et al., Respondents,
Glays ECOFFEY, etc., Petitioners,	Anna Rose LAPOINTE, etc., Petitioners,
v. WASHABAUGH COUNTY, et al., Respondents,	v. C. & M. McCORMICK, et al., Respondents,
Rosemond GOINS, etc., Petitioners,	Duane R. SANOVIA, etc., Petitioners,
v. Nick ASSMAN, et al., Respondents,	v. Leslie HANCOCK, et al., Respondents,
Lois Emery FALLIS, etc., Petitioners,	Mary Louise BORDEAUX, etc., Petitioners,
v. G. W. HOLMES, et al., Respondents,	v. Henry HORN, et al., Respondents,
Shirley Lee BORDEAUX, etc., Petitioners,	Marceline HASTINGS, etc. Petitioners,
v. Mary Ann HUNT, et al., Respondents,	v. PLATTE VALLEY & INVESTMENT CO., et al., Respondents,
Mary PRITZKAU, etc., Petitioners,	Marceline HASTINGS, etc., Petitioners,
v. COTTONWOOD RANCH & LIVESTOCK CO., et al., Respondents,	v. Frank MASSA, et al., Respondents.

(Full list of parties appears at Appendix pages 3-6.)

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
I. THE DECISION OF THE EIGHTH CIRCUIT DEPRIVES THOUSANDS OF INDIANS OF THE ABILITY TO PROTECT THEIR TRUST PROPERTY	9
II. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS IN PRINCIPLE WITH DE- CISIONS OF THIS COURT	12
A. The United States Is Not An Indispensable Party	12
1. The Decision Below Conflicts In Prin- ciple With Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) and Hodel v. Irving, — U.S. —, 107 S.Ct. 2076 (1987)	12
2. 25 U.S.C. § 345 Indicates That The United States Is Not An Indispensable Party To An Action To Recover An Allotment	16
B. The Burke Act Did Not Authorize The Sec- retary Of The Interior To Issue Fee Patents To Allottees Without Application Therefore And Without Making Individual Determina- tions Of Competency	17
C. Neither 28 U.S.C. § 2401(a) Nor 25 U.S.C. § 347 Bar This Action	20
1. 28 U.S.C. § 2401(a) Does Not Apply Here	20
2. 25 U.S.C. § 347 Is Inapplicable By Its Terms	21
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
<i>Baker v. United States</i> , 276 F. 283 (8th Cir. 1921)	18
<i>Begay v. Albers</i> , 721 F.2d 1274 (10th Cir. 1983)	16
<i>Bonser v. Shelbourn</i> , No. 82-3084	1
<i>Bordeaux v. Horn</i> , No. 83-3048	1
<i>Bordeaux v. Hunt</i> , 621 F.Supp. 637 (D.S.D. 1985)	1, 7, 19
<i>Brown v. Anderson</i> , 61 Okla. 136, 160 P. 724 (1916)	15
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912)	8
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	10, 11, 15, 20
<i>Covelo Indian Community v. Watt</i> , 551 F. Supp. 366 (D.D.C. 1982)	9, 12
<i>Creek Nation v. United States</i> , 318 U.S. 629 (1943)	15
<i>Ecoffey v. Washabaugh County</i> , 610 F. Supp. 1245 (D.S.D. 1985)	1, 2
<i>Fallis v. Holmes</i> , No. 85-5445	1
<i>Goins v. Assman</i> , No. 82-3079	1
<i>Hastings v. Massa</i> , No. 84-3002	1
<i>Hastings v. Platte Valley and Investment</i> , No. 83-3067	1
<i>Heckman v. United States</i> , 224 U.S. 413 (1912)	14, 15
<i>Hodel v. Irving</i> , — U.S. —, 107 S.Ct. 2076 (1987)	5, 6, 12, 13, 14
<i>Irving v. Clark</i> , 758 F.2d 1260 (8th Cir. 1985)	6
<i>Joint Tribal Council of Passamaquoddy Tribe v. Morton</i> , 528 F.2d 370 (1st Cir. 1975)	15
<i>Lane v. Pueblo of Santa Rosa</i> , 249 U.S. 110 (1919)	13
<i>Lapointe v. C. & M. McCormick</i> , No. 83-3030	1

TABLE OF AUTHORITIES—Continued

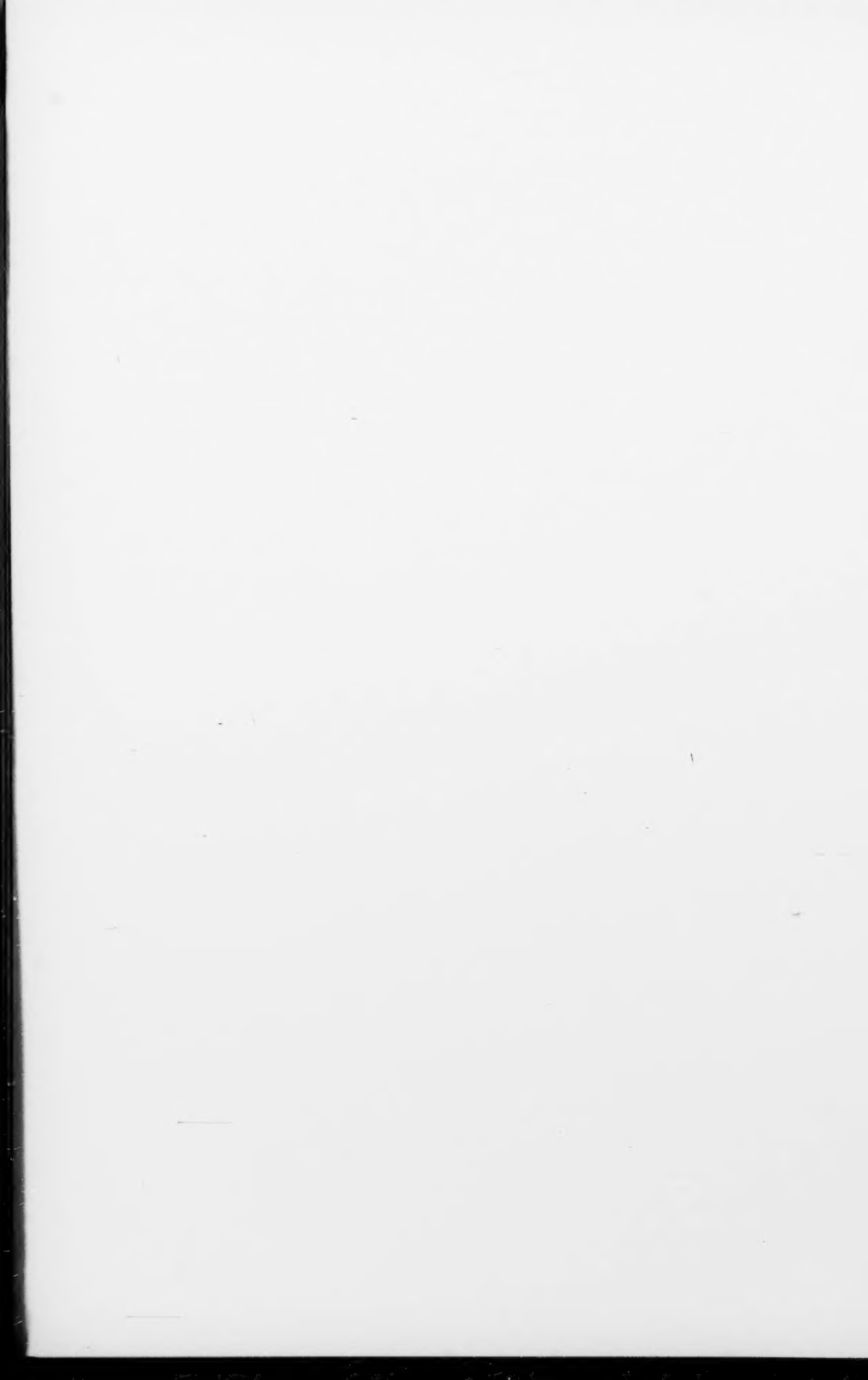
	Page
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	20
<i>Mottaz v. United States</i> , 753 F.2d 71 (8th Cir. 1985), rev'd on other grounds, 476 U.S. —, 106 S.Ct. 2224 (1986)	11
<i>Navajo Tribe of Indians v. State of New Mexico</i> , 809 F.2d 1455 (10th Cir. 1987)	11
<i>Nichols v. Rysavy</i> , 610 F. Supp. 1245 (D.S.D. 1985) ...	1, 2
<i>Poafpybitty v. Skelly Oil Co.</i> , 390 U.S. 365 (1968)	12, 13, 14, 15
<i>Potter v. South Dakota</i> , 610 F. Supp. 1245 (D.S.D. 1985)	1, 2
<i>Pritzkau v. Cottonwood Ranch & Livestock</i> , No. 82-3082	1
<i>Pritzkau v. Larson</i> , No. 82-3083	1
<i>Provident Bank and Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	13, 16
<i>Puyallup Indian Tribe v. Port of Tacoma</i> , 717 F.2d 1251 (9th Cir. 1983)	15
<i>Salder v. Public National Bank and Trust Co.</i> , 172 F.2d 870 (10th Cir. 1949)	15
<i>Sanovia v. Hancock</i> , No. 83-3036	1
<i>Skokomish Indian Tribe v. France</i> , 269 F.2d 555 (9th Cir. 1959)	15
<i>Squire v. Capoman</i> , 351 U.S. 1 (1956)	20
<i>United States v. Debell</i> , 227 F. 760 (8th Cir. 1915)	18
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	6, 14
<i>United States v. Mottaz</i> , 476 U.S. —, 106 S.Ct. 2224 (1986)	11, 16
<i>Vicenti v. United States</i> , 470 F.2d 845 (10th Cir. 1972)	16

TABLE OF AUTHORITIES—Continued

	Page
STATUTES:	
24 Stat. 388	4
25 Stat. 890, § 8	5
25 Stat. 891, § 11	5, 6
25 Stat. 892, § 12	5
36 Stat. 1093, Part 1 (1911)	20
96 Stat. 1976 (1982)	20
25 U.S.C. § 345	2, 3, 11, 14, 15, 16, 17
25 U.S.C. § 347	2, 3, 8, 20, 21
25 U.S.C. § 349	4, 6, 17
25 U.S.C. §§ 461 <i>et seq.</i>	5, 6
25 U.S.C. § 483	11
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1331	2
28 U.S.C. § 2401	4, 20
28 U.S.C. § 2401(a)	2, 8, 11, 20
28 U.S.C. § 2415	9
RULES:	
H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906)	19
S. Rep. 96-569, 96th Cong., 2d Sess. 3 (1980)	12
48 <i>Fed. Reg.</i> 13697-13920 (March 31, 1983)	10
48 <i>Fed. Reg.</i> 51204-51268 (Nov. 7, 1983)	10

TABLE OF AUTHORITIES—Continued

	Page
TEXTS:	
F. Cohen, <i>Handbook of Federal Indian Law</i> , (2d ed. 1982)	5
Senate Executive Document No. 51, 51st Cong., 1st Sess. (1890)	6



PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceedings on January 15, 1987.

— o —

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 809 F.2d 1317 (8th Cir. 1987), *reh'g denied*, — F.2d — (February 25, 1987). The judgment appears at Appendix p. 2 and the opinion is reprinted at Appendix pp. 3-40. The appeal consolidated fourteen cases from the central and western districts of South Dakota.

The opinion of the United States District Court for the Western District of South Dakota in the consolidated cases of *Nichols v. Rysavy*, *Potter v. South Dakota*, and *Ecoffey v. Washabaugh County* are published at 610 F. Supp. 1245 (D.S.D. 1985) and reprinted here at Appendix pp. 41-60. The opinion of the United States District Court for the Central District of South Dakota in the case of *Bordeaux v. Hunt* is published at 621 F. Supp. 637 (D.S.D. 1985) and is reprinted at Appendix pp. 61-107. This decision controlled the remaining unpublished cases from the Central District of South Dakota which were consolidated in the Eighth Circuit appeal, e.g., *Goins v. Assman*, No. 82-3079; *Fallis v. Holmes*, No. 85-5445; *Pritzkau v. Cottonwood Ranch & Livestock*, No. 82-3082; *Pritzkau v. Larson*, No. 82-3083; *Bonser v. Shelbourn*, No. 82-3084; *Lapointe v. C. & M. McCormick*, No. 83-3030; *Sanovia v. Handcock*, No. 83-3036; *Bordeaux v. Horn*, No. 83-3048; *Hastings v.*

Platte Valley and Investment, No. 83-3067; and *Hastings v. Massa*, No. 84-3002.

0

JURISDICTION

The petitioners invoked the jurisdiction of the district courts pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1331. The Court of Appeals assumed *arguendo* that jurisdiction existed under 25 U.S.C. § 345. On May 10, 1985, the District Court for the Western District of South Dakota granted Respondents' motion to dismiss in *Nichols v. Rysavy*, *Potter v. South Dakota*, and *Ecoffey v. Washa- baugh County* based on the sovereign immunity of the United States, the statute of limitations in 28 U.S.C. § 2401(a), the indispensability of the United States as a party and failure to state a claim.

On November 14, 1985, the District Court for the Central District of South Dakota granted Respondents' motions for summary judgment on the merits in the cases before it and also adopted the grounds relied upon by the district court in *Nichols v. Rysavy*.

On Petitioners' consolidated appeal, the Eighth Circuit Court of Appeals on January 15, 1987 entered a judgment and opinion holding that the statute of limitations in 28 U.S.C. § 2401(a) barred these actions against the United States and that the United States was an indispensable party whose absence required dismissal as to all parties. The court also stated that the statute of limitations in 25 U.S.C. § 347 is a possible source of limitation on petitioners' claims.

A timely petition for rehearing was filed on January 29, 1987 and was denied on February 25, 1987 (Appendix

p. 1). The petition was originally due on May 26, 1987. On May 20, 1987, Justice Blackmun issued an order extending the time for filing a petition through July 10, 1987.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 345. *Actions for allotments*

All persons who are in whole or in part of Indian blood or descent . . . who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, . . .

25 U.S.C. § 347. *Limitations of action for lands patented in severalty under treaties*

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary

of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situated shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others ~~than~~ members of any tribe of Indians.

Burke Act, 25 U.S.C. 349. *Patents in fee to allottees*

. . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. . . .

28 U.S.C. 2401. *Time for commencing action against United States*

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . .

—o—

STATEMENT OF THE CASE

These are "forced fee" cases brought by Sioux Indians to recover interests in lands allotted to individual Indians from tribal land pursuant to the policy expressed in the General Allotment Act of 1887, 24 Stat. 388, (Dawes

Act).¹ The policy of the Dawes Act was applied to the Sioux Indians by the Act of March 2, 1889, 25 Stat. 888, which broke up the Great Sioux Reservation into several smaller reservations and implemented the allotment policy within each reservation. The Sioux Allotment Act provided for allotments of 320 acres to each head of family and lesser amounts to other categories of Indians. 25 Stat. 890, § 8. The Secretary of the Interior was authorized to negotiate with the tribes for the purchase of "surplus" lands remaining after allotment. 25 Stat. 892, § 12.² "In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the lands were to be held in trust by the United States." *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076, 2078 (1987), 25 Stat. 891, § 11.³ At the expira-

¹ Forced fee patents are fee patents issued to allottees prior to expiration of the trust period. They are known as "forced fees" because they were issued without the allottees' application therefore. The effect of a validly issued fee patent was to terminate the trust. Petitioners maintain that the forced fee patents challenged in these suits were void and did not terminate the trust.

² At the time the Dawes Act was passed, Indian land holdings amounted to approximately 138 million acres. Between 1887 and the passage of the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq., in 1934, that area was reduced to approximately 48 million acres. Sixty million acres were sold or ceded as "surplus." F. Cohen, *Handbook of Federal Indian Law*, (2d ed. 1982) at 138.

³ In negotiations with the Indians over the terms of the Sioux Allotment Act, the Indians were told:

And if you take your land in severalty a deed is given to you by the Great Father, and he holds it in trust for you for twenty-five years, so that you cannot be traded or

(Continued on following page)

tion of the trust period, a fee patent was to be issued to the allottee, "free of all charge or incumbrance whatsoever." 25 Stat. 891, § 11. The President was given discretion to extend the trust period and did so. *Id.* Congress extended it indefinitely in 1934. 25 U.S.C. § 462. During the period of the trust, any lease, conveyance, or contract touching the land was "absolutely null and void." 25 Stat. 891, § 11. The land could not be sold, mortgaged or taxed. The purpose of the trust period was to provide protection to allottees during their adjustment to the dominant society. *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980).

The Sioux Allotment Act provided that "each and every allottee . . . shall be entitled to all the rights and privileges and be subject to all the provisions of section six" of the Dawes Act, 25 Stat. 891, § 11. Congress amended section six of the Dawes Act by passage of the Burke Act in 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349). The Burke Act contains the language central to this case:

. . .

Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, in-

(Continued from previous page)

cheated out of it, so that it will remain for you and your children and your children's children.

(Gen. Warner at Pine Ridge Agency, Dakota, June 15, 1889). Senate Executive Document No. 51, 51st Cong., 1st Sess. (1890) cited in *Irving v. Clark*, 758 F.2d 1260, 1266, fn. 10 (8th Cir. 1985), *aff'd* *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076 (1987).

cumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.

...

This language shifted the responsibility of issuing fee patents from Congress to the Secretary of the Interior. App. p. 10.

From 1906 to 1916, the Secretary of the Interior granted fee patents only to allottees who applied for them and were found competent. In 1916, Secretary of the Interior Franklin K. Lane began a new policy of seeking out competent Indians and issuing fee patents to them whether they had applied for them or not. App. p. 11. This became known as the "forced fee patent" policy. On April 17, 1917, Commissioner Cato Sells issued "A Declaration of Policy" which provided that competency commissions were from that time to investigate only allottees of one-half or more Indian blood. Allottees of less than one-half Indian blood were presumed competent and received fee patents without application or other investigation into their competency. App. p. 12. In 1919, the presumption of competence was extended to adult allottees of one-half Indian blood. App. p. 13.

The policy was disastrous for allottees. As the Court of Appeals noted below, "Thousands of Indians in the western United States received forced fee patents, with primarily harsh results." App. p. 13. Quoting from Judge Porter's opinion in *Bordeaux v. Hunt*:

Abuses were rampant: It is clear from the historical evidence * * * that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a

more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed under the rule of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

Id. In 1921, "[t]he policy of issuing patents in fee to Indians of one-half or less Indian blood without further proof of competency was discontinued." 1921 Annual Report of the Secretary of the Interior at p. 54.

The Petitioners have sued to recover allotments lost through sale or foreclosure after receiving fee patents pursuant to the forced fee patent blood quantum policy. Their theory is that applications for fee patents and individual determinations of competency were prerequisites to the existence of the Secretary's authority to issue fee patents. Since the Secretary did not comply with these prerequisites, the issuance of the fee patents was void *ab initio* and the land is still subject to the federal trust. All subsequent transfers by the allottees were void. The present occupants of the land were sued as was the United States.

The Court of Appeals held that the statute of limitations contained in 28 U.S.C. § 2401(a) barred these actions against the United States and that the United States was an indispensable party without whose presence the cases could not proceed. App. pp. 8, 22 and 34-39. The Court also stated that 25 U.S.C. § 347 is a possible source of limitation on Petitioners' claims. App. p. 8 and pp. 33-34. Finally, the Court held that the forced fee patents were not void since the Secretary had the general power

to issue them. In the court's view, they were at most, voidable. App. pp. 28-30.⁴

o

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT DEPRIVES THOUSANDS OF INDIANS OF THE ABILITY TO PROTECT THEIR TRUST PROPERTY

The forced fee policy represents one of the most disgraceful chapters in the history of federal Indian policy. Indians are now seeking to rectify some of the injustices suffered as a result of that illegal policy. The impetus for this action on the part of Indians came from the federal government, which identified thousands of forced fee claims and notified the Indians of them.⁵

⁴ The Court stated that its decision rested on purely procedural grounds and did not reach the legality of the forced fee patents. Nevertheless, the Court, in reaching its decision, did reject Petitioners' claim that the Secretary's actions were void.

⁵ The history of how the government came to do this is set out in *Covelo Indian Community v. Watt*, 551 F. Supp. 366 (D.D.C. 1982). Briefly, the federal government became concerned that 28 U.S.C. § 2415, which was enacted in 1966 to provide a statute of limitations for certain claims brought by the United States, might be construed to apply to claims which the United States could bring on behalf of Indians. An extension of the statute as to those claims was sought and obtained. Meanwhile, a massive effort to identify any such claims was undertaken. Because of the number of claims, additional extensions were granted in 1977 and 1980. Thousands of forced fee claims were identified, and Indians were notified of them. Because of federal complicity, these cases were viewed as inappropriate for suit by the federal government. Thus, Congress provided in the 1980 extensions for the submission of legisla-

(Continued on following page)

Pursuant to the Indian Claims Limitation Act of 1982, 96 Stat. 1976-1978, lists of potential tribal and individual claims against third parties have been published in the *Federal Register*. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). Thousands of claims are specifically identified as forced fee patent claims and are directly affected by the Eighth Circuit's decision in these cases. See 48 *Fed. Reg.* 51204-51268 (Nov. 7, 1983) and 48 *Fed. Reg.* 13697-13920 (March 31, 1983). Forced fee patent claims are listed from states located in the Seventh, Eighth, Ninth and Tenth federal circuits. It is impossible to state with certainty how many acres of land were lost to Indians because of the forced fee patent policy, but more than one million acres and thousands of Indians are likely affected.⁶

The Eighth Circuit opinion backhandedly validates the federal government's illegal actions. The Court of Appeals purported to dispose of the cases below on purely procedural grounds. App. p. 8. Nevertheless, in its determination that the statute of limitations contained in 28

(Continued from previous page)

tive solutions as to those claims not appropriate for litigation. When it became apparent that the government was not going to comply with this requirement, the *Cove/o* litigation was filed and a lobbying effort mounted to obtain a further extension. The result was the Indian Claims Limitation Act of 1982, 96 Stat. 1976-1978, which required lists of claims to be published in the *Federal Register* and provided varying statutes of limitation depending on the action taken by the federal government in relation to a particular claim or class of claims.

⁶ Fee patents were issued for over 2.4 million acres of trust land from 1917-1920, the period the policy was in effect. 1920 Annual Report of the Commissioner of Indian Affairs (ARCIA), p. 172. The vast majority were forced fee patents issued pursuant to the 1917 Declaration of Policy. Estimates have been made that two-thirds of allottees issued fees were unable to hold on to their land. 1921 ARCIA at p. 25.

U.S.C. § 2401(a) applied to this action, the Court rejected the argument that the statute never started to run because the land was still held in trust. The Court of Appeals had held in *Mottaz v. United States*, 753 F.2d 71 (8th Cir. 1985), *rev'd on other grounds*, 476 U.S. —, 106 S.Ct. 2224 (1986), that so long as the land continued to be held in trust the statute of limitations would not run. The Court below held that the land here was no longer in trust because the Secretary's actions made the fees, at most, voidable.

The holding below that the United States is an indispensable party extends far beyond forced fee cases. The decision destroys the majority of claims under the Indian Claims Limitation Act of 1982 which were intended to give the Indians one last chance to bring their claims.⁷ *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). In addition, the opinion below establishes a rule which devastates the ability of Indians nationwide to protect their trust interests.

⁷ Cf. *United States v. Mottaz*, 476 U.S. —, 106 S.Ct. 2224 (1986). *Mottaz* involved a transfer of an allotment without the consent of all the owners as required by 25 U.S.C. § 483. Most secretarial transfers presumably ended up in the possession of parties other than the United States and would not be barred by the statute of limitations which proved fatal in *Mottaz*, but will be barred by the decision below. Other cases potentially affected by the Court of Appeals' decision are rights of way and other trespass cases. Many of the claims listed pursuant to the Indian Claims Limitation Act of 1982 are secretarial transfers, rights of way or trespass cases. See also *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1471-73 (10th Cir. 1987) (United States an indispensable party to an action to recover lands from third parties where Indian and federal interests are not aligned).

II. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT

A. The United States Is Not An Indispensable Party

1. *The Decision Below Conflicts In Principle With Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) and *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076 (1987)

In holding that the United States is an indispensable party to these actions to recover interests in allotments, the Court of Appeals did not even mention *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). In that case, this Court held that allottees had standing to bring an action for breach of an oil and gas lease. The United States did not have to bring the suit. In speaking of the allotment system's objectives of safeguarding Indian land while at the same time preparing the Indians to take their place in modern society, this Court stated: "This dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." 390 U.S. at 369.

This observation is nowhere more pertinent than in the forced fee context, where the federal government will not bring these cases on behalf of Indians in large part because of its own "serious problem of complicity . . . in bringing about many improper transfers and encumbrances of Indian land . . ." See *Covelo Indian Community v. Watt*, 551 F. Supp. 366, 382 (D.D.C. 1982) See also S. Rep. 96-569, 96th Cong., 2d Sess. 3 (1980). There is no reasonable expectation that the federal government will ever bring these cases. The only hope for protection of the allotments lies with the Indians themselves.

In this Court's recent opinion in *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076 (1987), the Court held that heirs to interests in allotments made under the Sioux Allotment Act had standing to bring decedents' claims where the Secretary of the Interior could "hardly be expected to assert appellees' decedents' rights" to the extent they turned on a claim that a federal statute was unconstitutional. 55 U.S.L.W. at 4655.

The Court of Appeals failed to give controlling weight to the policy of protecting allotments that *Poafpybitty* and *Hodel* require. While it recognized the availability of a forum as one of the factors expressed in *Provident Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968), as being relevant to a determination of indispensability, App. p. 37, it gave controlling weight to the interests of the party defendants, the United States, and the public interest.⁸ App. 37-40. The "interests" that the Court found controlling do not warrant such weight.⁹ The Court mentioned but did not discuss the defendants' "wish to avoid multiple

⁸ As to the public interest, the Court of Appeals was concerned that "[i]f these fee patents can be successfully attacked, the entire United States' title system is in jeopardy." App. p. 39. This concern is misplaced. The fee patents involved here are not grants from the public domain. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). The land was once aboriginal land of the Sioux. Then it became reservation land, and then allotted land. The fee patent, when properly issued, terminates the trust. No non-Indian interest in these cases trace back to an original grant of a fee patent from the United States to a non-Indian. And no third party is attacking the patent—the grantee is attacking it. That the fee patents here may be attacked has no relevance to whether a grant of land from the United States may be generally attacked.

⁹ The Court purportedly viewed the interests of the party defendants and the United States as intermeshed. But in fact, the Court discussed only factors dealing with the United States.

litigation, inconsistent relief, or sole responsibility for liability he shares with another." App. p. 37. As noted previously, the United States has refused to bring these cases on behalf of allottees; therefore, there is no danger of multiple litigation or inconsistent relief. As for the nonfederal defendants' desire to share liability with the United States, that surely cannot override the protection of allotments provided for in the General Allotment and Sioux Allotment Acts, and recognized by this Court in *Poafpybitty* and *Hodel*. Defendants have not pointed to any right to indemnity from the United States. *Poafpybitty* does not allow the Court of Appeals' implicit assumption that if someone has to suffer, it may as well be the Indians.

The Court had two main concerns about the United States. First, the Court felt that without the presence of the United States it would be inappropriate to find that the United States held the land in trust. Second, it felt it would be inappropriate to try the government's liability behind its back. App. pp. 37-38. Both these concerns are misplaced.

Assuming *arguendo* that 25 U.S.C. § 345 is not itself a sufficient answer to the Court of Appeals' concern, *Heckman v. United States*, 224 U.S. 413 (1912) is.¹⁰ *Heckman*,

¹⁰ In *Heckman*, the lands involved were not held in trust, but were subject to restrictions against alienation. For present purposes, that difference is not material. This Court in *United States v. Mitchell*, 445 U.S. 535 (1980) held that the purpose of trust status of allotted lands was simply to ensure nontaxibility and to prevent alienation. 445 U.S. at 544. No active management duties were thereby placed on the United States. 445 U.S. at 546. Thus, the trust here serves the same function as the restraint on alienation in *Heckman* and a finding that the lands here are still held in trust would result in no more burden

(discussed extensively in *Poafpybitty*) involved a suit by the United States to cancel certain conveyances of allotted lands made by members of the Cherokee Nation. Some 16,000 defendants and some 30,000 conveyances by members of the Five Civilized tribes were ultimately to be affected. The contention was that the conveyances were in violation of existing restrictions upon the power of alienation. This Court upheld the right of the United States to maintain suits on behalf of the allottees but specifically noted that the government could either bring the necessary suit itself or allow the litigation to be prosecuted by the Indian. *Heckman*, 224 U.S. at 446.¹¹

The Eighth Circuit itself acknowledged that actions under 25 U.S.C. § 345 which result in a finding that land is held in trust by the United States can be brought without

(Continued from previous page)

on the federal government than the finding that the lands in *Heckman* were still subject to a restraint on alienation. The trust here would also serve the same function as protection of aboriginal title through applicability of the Nonintercourse Act, 1 Stat. 137. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The United States was not a party to the *Oneida* case. And yet, at times, the protection afforded by the Nonintercourse Act can give rise to federal obligations. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

¹¹ "Later decisions followed the implications of *Heckman* and held that the right of the United States to institute a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. at 370. *Citing Creek Nation v. United States*, 318 U.S. 629 (1943); *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959); *Salder v. Public National Bank and Trust Co.*, 172 F.2d 870, 874 (10th Cir. 1949); and *Brown v. Anderson*, 61 Okla. 136, 160 P. 724 (1916). See also *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983), *cert. denied*, U.S. 1049, *reh'g denied*, 466 U.S. 954 (United States not an indispensable party and collecting cases).

joining the United States, *citing Vicenti v. United States*, 470 F.2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973) and *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983). App. p. 38. The distinguishing feature here, as the Court saw it, was the potential liability of the United States. But the United States will not be bound by any finding of wrongdoing. *Provident Bank and Trust Co. v. Patterson*, 390 U.S. at 114. Furthermore, the United States would have available to it all of its normal defenses against the third parties.

2. *25 U.S.C. § 345 Indicates That The United States Is Not An Indispensable Party To An Action To Recover An Allotment*

This Court in *United States v. Mottaz*, 476 U.S. —, 106 S.Ct. 2224 (1986), held that 25 U.S.C. § 345 provides jurisdiction over actions seeking the issuance of an allotment in the first instance and actions involving claims to already existing allotments. 106 S.Ct. at 2231, App. pp. 17-20. In the first type of suit, the United States is required to be joined, "while as to the latter class of cases, no mention of United States' participation is made." *Id.* To hold that the United States must be joined in all cases under § 345 would restrict access to federal court afforded Indians raising claims involving their land entitlements. *Id.* at n.9.

Furthermore, this Court noted that the remedial clause of 25 U.S.C. § 345 "provides that a judgment in favor of an Indian 'claimant' shall have the same effect . . . as if such allotment had been allowed and approved by [the Secretary of the Interior].'" 106 S.Ct. at 2232. This is so even where the United States is not a party. *Id.* at

n.9. This answers any concern about declaring land to be held in trust in the absence of the United States. There is no indication in 25 U.S.C. § 345 that the United States need be joined in an action to recover an allotment.

B. The Burke Act Did Not Authorize The Secretary Of The Interior To Issue Fee Patents To Allottees Without Application Therefore And Without Making Individual Determinations Of Competency

The Secretary forced thousands of fee patents on allottees based on a presumption that they were competent. Petitioners argued below that the Secretary's authority to issue fee patents pursuant to the Burke Act was conditioned upon receipt of an allottee's application for a fee patent and upon making an individual determination of the allottee's competency. If either condition was not fulfilled, authority was lacking, the issuance of the patents was void, and the lands are still held in trust. The Court of Appeals held that the Burke Act, 25 U.S.C. § 349, empowered the Secretary to issue the fee patents; therefore the lands were no longer in trust. App. p. 30. "Because the fee patents at issue were not void, but possibly voidable, they were not the "nullity" that appellants propose . . ." *Id.* The Court's interpretation is inconsistent with the language, legislative history and contemporaneous administrative interpretation of the Burke Act.

While there is no specific requirement in the statute for an application, Congress had never issued fee patents without them and all Congress was doing under the Burke Act was transferring its task to the Secretary. App. p. 10. Nor did the Secretary issue fee patents to allottees absent an application during the first ten years of the Burke Act. App. p. 11.

As to determinations of competency, the Act provides that the Secretary "... is authorized whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs ... to cause to be issued to such allottee a patent in fee simple." The existence of the authority is conditioned upon a case-by-case determination, and not upon a mere presumption of competency. The Eighth Circuit had itself placed this natural reading on the Act in earlier cases. *Baker v. United States*, 276 F. 283 (8th Cir. 1921); *United States v. Debell*, 227 F. 760 (8th Cir. 1915). In *Baker*, a criminal prosecution for conspiracy to defraud the United States in respect of its trust duties to certain Indians and their allotted lands, the Court of Appeals read the Act as authorizing the Secretary of the Interior "to issue patents in fee in individual cases in which he was satisfied that the Indians were competent and capable of managing their own affairs." 276 F. at 284.

And in *United States v. Debell*, an opinion issued prior to the Secretary's Declaration of Policy, the Court of Appeals had interpreted the Burke Act as establishing a very stringent test of the competency of the allottee.

It is indispensable to that competency and capability to manage his affairs which conditions the right of the Secretary to issue a patent in fee simple to an Indian under the first proviso of section 6 in chapter 2348, 34 Stat. 182, 183, that he shall have at least sufficient ability, knowledge, experience, and judgment to enable him to conduct the negotiations for the sale of his land and to care for, manage, invest, and dispose of its proceeds with such a reasonable degree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds.

227 F. at 770. Such a comprehensive determination of competency is inconsistent with any approach other than a case-by-case determination. *Cf. Bordeaux v. Hunt*, App. pp. 88-90.

The case-by-case approach is also the only approach consistent with the legislative history. The legislative history is clear that the purpose of the Act was to transfer responsibility for issuing fee patents from Congress to "the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs." H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906). App. p. 11. The House Report contains a copy of a letter from Indian Commissioner Leupp stating that the "bill makes it the duty of the Secretary . . . to satisfy himself of the civic competency of the allottee concerned. Through [his officers] the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant." *Id.* at p. 4. Thus, the Burke Act was intended to lessen the chance of an incompetent Indian being issued a fee patent and thereby losing his or her allotment.

The Secretary was not authorized to adopt the broad-scale approach of using blood quantum as an indicator of competency. All of the patents issued pursuant to that policy were unauthorized and therefore void *ab initio*. Because of the importance of the interpretation of the Burke Act to thousands of allottees and the dubious interpretation by the Court of Appeals, this Court should grant *certiorari*.

C. Neither 28 U.S.C. § 2401(a) Nor 25 U.S.C. § 347 Bar This Action

1. 28 U.S.C. § 2401(a) Does Not Apply Here

28 U.S.C. § 2401(a) derives from former § 41(20) of Title 28 of the 1940 Code which was the same in the 1926 Code and in the 1911 Code where it originated. 36 Stat. 1093, Part 1 (1911). None of these prior code sections could possibly have been read to limit actions by Indians concerning their right to allotments. In 1948, the United States Code was revised. The Reviser's Notes to 28 U.S.C. § 2401(a) state that § 2401 "[c]onsolidates the provision in section 41(20) [the predecessor to § 2401(a)] of Title 28 U.S.C., 1940 ed., as to time limitation for bringing contract actions against the United States with section 942 [torts time limitation] of said Title 28." H. Rep. No. 308, 80th Cong. 1st Sess. p. A185 (1947); note also published at 28 U.S.C.A. § 2401.

In the 1948 revision, there was no intent to apply a statute of limitations where it had not applied before. And any intent to diminish special Indian rights must be clearly expressed. *Squire v. Capoeman*, 351 U.S. 1 (1956). *Morton v. Mancari*, 417 U.S. 535 (1974). Here, to apply 28 U.S.C. § 2401 would also be inconsistent with the Indian Claims Limitation Act of 1982, 96 Stat. 1976 (1982). As this Court stated in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985):

In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians.

. . .

Congress [thus] intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf. Thus, we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations.

2. *25 U.S.C. § 347 Is Inapplicable By Its Terms*

The Eighth Circuit Court of Appeals' opinion noted 25 U.S.C. § 347 as a "potential source of limitation on appellants' claims," App. p. 8, and as "a possible independent source of limitation." App. pp. 33-34. Assuming *arguendo*, it was a basis of the Court's opinion it is erroneous. The Act by its terms applies only to lands allotted under treaty. The allotments here were all issued under the Act of 1889. Also, it only applies to lands where a deed has been approved by the Secretary of the Interior. None of the deeds to non-Indians here were approved by the Secretary of the Interior. The Court of Appeals offers no basis whatsoever for its conclusion that 25 U.S.C. § 347 applies.

CONCLUSION

These cases present issues of great importance. The Eighth Circuit Court of Appeals resolved these issues erroneously, to the great detriment of Indian people to protect their property. This Court should grant *certiorari* to review the Eighth Circuit's decision.

Dated this 9th day of July, 1987.

Respectfully submitted,

KIM JEROME GOTTSCHALK
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for Petitioners

App. 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-5234/5432/5445/86-5034
5035/5036/5037/5038/5039
5040/5041/5042-SD

Katherine B. Nichols, etc.,
et al.,

Appellants,

vs.

Don Rysavy, et al.,

Appellees.

*
* Appeals from the
* United States District
* Court for the District
* of South Dakota
*
*
*
*
*
*

Appellants' petition for rehearing en banc has been
considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 25, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

Nos. 85-5234/5432/5445/86-5034/5035/5036/5037/5038/
5039/5040/5041/5042

Katherine B. Nichols, etc.,
et al.,

Appellants,

v.

Don Rysavy, et al.,

Appellees.

*
* Appeals and Cross-
* Appeals from the
* United States District
* Court for the District
* of South Dakota.
*
* (Filed January
* 15, 1987)
*

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

January 15, 1987

(SEAL)

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

App. 3

Katherine B. NICHOLS, Individually and as Special Administratrix of the Estate of Amelia Huston Nichols No. 593, Deceased, Appellant.

v.

Don RYSAVY, Margaret Rysavy, Raymond DeMers, Leo Novotny, Raymont DeMers, Geraldine DeMers, Doris Rysavy, Estates of W. & A. Rysavy, J. Rysavy, James Rysavy, William Rysavy, Amelia Rysavy, the United States of America, Hon. Donald P. Hodel as United States Secretary of the Interior, Ken Smith as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Clover POTTER, Individually and as the Special Administratrix of the Estate of James Wilde, Appellant,

v.

STATE OF SOUTH DAKOTA, United States of America, Donald P. Hodel as U.S. Secretary of the Interior, Ken Smith as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Gladys ECOFFEY, Individually and as Special Administratrix of the Estate of John Yellow Bird, Appellant,

v.

WASHABAUGH COUNTY, United States of America, Donald P. Hodel as U.S. Secretary of the Interior, Ken Smith as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, Safeco Title Insurance Company of Idaho, Stewart Title Guaranty Company, Ticor Title Insurance Company, Title Insurance Company of Minnesota, Transamerica Title Insurance Company, USLIFE Title Insurance Company of America, Amici Curiae For Appellees.

App. 4

Rosemond GOINS, Individually and as Special Administratrix of the Estate of Ida Huston Roubideaux, Appellants,

v.

Nick ASSMAN, Edwin Assman, W.O. Assman, William Assman, Isabelle Assman, Dorothy Assman, Donald Assman, Clarence Assman, Sadie Assman, Joe Assman, Esther Assman, Assman Realty, the United States of America, Honorable James Watt, as United States Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Lois Emery FALLIS, Individually and on behalf of the Heirs, Devisees, Benefactors and Assigns of Robert Emery, deceased, Appellant,

v.

G.W. HOLMES and Delores Holmes, United States of America, Honorable William Horn, United States Secretary of the Interior and Ross Swimmer, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Shirley Lee BORDEAUX, Individually and as Special Administratrix of the Estate of Clara Hudson, No. 3196, deceased, Appellant,

v.

Mary Ann HUNT, Estate of Lyle T. Hunt; Alvina Woockmann, The United States of America: Honorable Donald Hodel, as United States Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Mary PRITZKAU, Individually and as Special Administratrix of the Estate of Narcisse Rich, Allotment No. 1163, Deceased, Appellant,

v.

COTTONWOOD RANCH & LIVESTOCK CO., Charles Steen, Vera Steen, Louis Buduhl, Chester Buduhl, the United States of America, Honorable Donald Hodel, as

App. 5

Secretary of the Interior; Ken Smith, Secretary of the Interior for Indian Affairs, Tri-County Water Association, Appellees.

MARY H. PRITZKAU, Individually and as Special Administratrix of the Estate of Julia Narcelle, Appellant,

v.

Helen LARSON, Estate of Clifford Larson; Ziebach County, The United States of America, Honorable Donald Hodel, as United States Secretary of the Interior; and Ken Smith, Assistant Secretary of the Interior for Indian Affairs, Appellees.

Elsie BONSER, Individually and as Estate Administratrix of the Estate of Mattie J. Bonser, No. 142½, Deceased, Appellant,

v.

Ruth SHELBOURN; Julius Wahl; Dorothy Wahl; Todd County Independent School District; Joseph Shelbourn; Floyd Reagle; Ethelena Reagle; The United States of America; Honorable Donald Hodel, as United States Secretary of the Interior and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Anna Rose LAPOINTE, Individually and as Special Administratrix of the Estate of Lena Lima Bourdeaux, Appellant,

v.

C. & M. McCORMICK; Mary Abdellah; Charles McCormick; Will Maggrett; United States of America; Honorable Donald Hodel, as United States Secretary of the Interior and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Duane R. SANOVIA, Individually and as Special Administrator of the Estate of James Sanovia, Deceased, Appellant,

v.

Leslie HANDCOCK, Thelma Handcock, Mae Handcock, Estate of M.D. Handcock, United States of America;

App. 6

Donald Hodel, Secretary of the Interior; Ken Smith, Assistant Secretary of the Interior for Indian Affairs, Appellees.

Mary Louise BORDEAUX, Individually and as Special Administratrix of the Estate of Clementine Hudson, Appellant,

v.

Henry HORN, Marion Horn, Elmer Horn, Estate of A. Horn, Anna Horn, United States of America; Honorable Donald Hodel, as Secretary of the Interior; Ken Smith, Assistant Secretary of the Interior for Indian Affairs, Appellees.

Marceline HASTINGS, Individually, and as Special Administratrix of the Estate of Frank McCloskey, Deceased, Appellant,

v.

PLATTE VALLEY AND INVESTMENT CO.; Earl Hollenbeck; Vincent Hollenbeck; V. Hollenbeck; The United States of America; Honorable Donald Hodel, as United States Secretary of the Interior and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Marceline HASTINGS, Individually and as Special Administrator of the Estate of Mary Pure Blacksmith, Deceased, Appellants,

v.

Frank MASSA, Esther Massa, Guisto Massa, Maria Massa, Charlotte Abrams, a/k/a C. Cherniak; The United States of America; Honorable Donald Hodel, as Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

App. 7

Nos. 85-5234, 85-5432, 85-5445,
86-5034 to 86-5042.

United States Court of Appeals,
Eighth Circuit.

Submitted May 13, 1986.

Decided Jan. 15, 1987.

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

From 1916 to 1921, appellants' ancestors received fee simple patents, granting them full title to land allotments originally held for them in trust by the United States. These fourteen cases, consolidated on appeal, stem from the government's issuance of those fee patents. Appellants claim that the fee patents were illegally issued to their forebears, thus voiding all later transfers of the property. Appellants seek recognition that the land is still held in trust, return of possession, damages for wrongful possession, and attorneys' fees. Appellees are the United States, the State of South Dakota, Washabaugh County, South Dakota (now Jackson County), and various private landowners who obtained the land in good faith through chain of title. Several title insurance companies filed amicus

curiae briefs for appellees. The district courts¹ entered summary judgment for appellees. We affirm, based on the following: (1) We do not reach the legality of the forced fee patents, as our disposition rests on purely procedural grounds. (2) The statute of limitations in 28 U.S.C. § 2401(a) bars this action as against the United States. (3) The United States is an indispensable party, requiring dismissal of the action as to all appellants with prejudice. (4) Another potential source of limitation on appellants' claims is 25 U.S.C. § 347.

I. HISTORICAL BACKGROUND

These cases arise from the General Allotment Act (Dawes Act) of February 8, 1887, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.*). The Dawes Act reflected a:

policy of encouraging the assimilation of Indians into the white man's culture. * * This policy was carried out by "alloting" to individual Indians sufficient resources to enable them to become independent farmers and ranchers. * * * As stated in [a] Senate Report [in 1907]:

The policy of allotting Indian lands in severality, so as to break up the old tribal relations, has been going on for years. Ultimately the Indian must become a citizen and work upon the new lines necessarily created by his present environments. He must learn to farm, to raise live stock, and to abandon the aboriginal methods of life. Large

1. The Hon. Andrew W. Bogue, Chief Judge, United States District Court for the District of South Dakota, Western Division, and The Hon. Donald J. Porter, Chief Judge, United States District Court for the District of South Dakota, Central Division.

App. 9

areas of Indian lands have already been thus allotted, and many of the tribes have become farmers and stock raisers.

United States v. Overlie, 730 F.2d 1159, 1162 (8th Cir. 1984).

The Dawes Act divided up Indian reservations when they could "be advantageously utilized for agricultural or grazing purposes" by the Indians. Indians then received individual land allotments, with the United States holding title in trust for the allottees for twenty-five years, during which time an allotment could not be sold, mortgaged, or taxed. After twenty-five years, the allottee or his heirs received the land in fee simple.

The main purpose of the twenty-five-year trust period was "for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property * * *". Statement of Rep. Skinner, 18 Cong.Rec. 190 (1886), *quoted in United States v. Mitchell*, 445 U.S. 535, 544 n. 5, 100 S.Ct. 1349, 1354-55 n. 5, 63 L.Ed.2d 607 (1980).

In South Dakota, individual Indian allotments were created by the Act of March 2, 1889, Ch. 405, 25 Stat. 888, which divided the Great Sioux Reservation into seven smaller reservations. *See United States v. Erickson*, 478 F.2d 684, 686 (8th Cir.1973). Sections 8 through 11 of the 1889 Act authorized individual allotments, similar to those created under the Dawes Act, and section 11 provided that "each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of" the Dawes Act. Section 6 of the

Dawes Act stated that "[u]pon the completion of said allotments and the patenting of the lands to said allottees," the allottees would become United States citizens and be subject to the laws of the state or territory in which they lived.

The Supreme Court, in *Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), construed section 6 of the Dawes Act to give Indians citizenship and thus subject them to state laws upon the initial issuance of an allotment. In part reacting to this decision, Congress, in the Burke Act of 1906, Ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349), amended section 6 of the Dawes Act to defer citizenship until "the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * *." Congress also enacted in the Burke Act the language central to this case:

Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land s ll be removed
* * *

Thus the Burke Act shifted the responsibility of issuing fee patents from Congress to the Secretary of the Interior, and gave the Secretary authority to issue fee patents to allottees before the trust period expired.² The reason for

2. Even before this amendment, however, special legislation had been enacted during each session of Congress granting fee simple patents to individual allottees before the twenty-five-year trust period ended. H.R.Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906); *Monson v. Simonson*, 231 U.S. 341, 346, 34 S.Ct. 71, 72-73, 58 L.Ed. 260 (1913).

this shift in responsibility was reflected in the House Committee report:

this provision * * * will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs.

H.R.Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906).

Another explanation is that the Burke Act was "intended to accelerate the assimilation of the Indians by truncating the length of the trust period and the benefits derived therefrom for Indians determined to be competent." *County of Thurston, State of Nebraska v. Andrus*, 586 F.2d 1212, 1219 (8th Cir.1978), *cert. denied*, 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1979).

From 1906 to 1916, the Secretary of the Interior granted early fee patents only to allottees who applied and were deemed competent, generally on the local Indian superintendent's recommendation. In 1916, however, Secretary of the Interior Franklin K. Lane began a new policy. Officials of the Department of the Interior were told to visit reservations and determine whether individual Indian allottees were competent. These "competency commissions" issued fee patents to allottees they found competent whether or not the allottees applied for a patent. This became known as the "forced fee patent" policy. Secretary Lane stated, in support of the plan: "we should henceforth make a positive and systematic effort to cast the full burden of independence and responsibility upon an in-

creasing number of the Indians of all tribes. * * * To turn the Indian loose from the bonds of governmental control, * * * this program we are adventuring upon." Letter from Secretary Lane to Representative Stephens, *quoting* the 1914 Annual Report of the Commissioner of Indian Affairs (ARCIA) (March 8, 1916). Commissioner of Indian Affairs Cato Sells noted, however, that "[u]p to this time no fee patents have been issued to Indian allottees unless they made application therefor. * * * Whether the issuance of patents in fee has been of material benefit to Indian allottees is a debatable question. On some reservations the result was disastrous * * *." Letter from Commissioner Sells to Secretary Lane (May 19, 1915).

On April 17, 1917, Commissioner Sells went a step further and issued "A Declaration of Policy," which provided that competency commissions were now to investigate only allottees of one-half or more Indian blood. Under this "blood quantum" policy, allottees of less than one-half Indian blood were presumed competent and received fee patents without investigation. The declaration stated:

To all able-bodied adult Indians of less than one-half Indian blood; there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home.

Indian students, when they are 21 years of age, or over, who complete the full course of instruction in the Government schools, receive diplomas and have demonstrated competency will be so declared.

In 1919 the presumption of competence was extended to adult allottees of one-half Indian blood.

Thousands of Indians in the western United States received forced fee patents, with primarily harsh results. As Judge Porter stated:

Abuses were rampant: it is clear from the historical evidence * * * that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed under the rule of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

Bordeaux v. Hunt, 621 F.Supp. 637, 640 (D.C.S.D.1985).

In 1921, however, the entering Harding Administration reversed Sells' policy. Charles H. Burke, former congressman from South Dakota and author of the Burke Act, became the Commissioner of Indian Affairs. On April 1, 1921, he announced in his annual report that an application and examination of competency would once again be required for all allottees. 1921 ARCIA at 23. Commissioner Burke claimed that the previous policy had violated the intent of the Burke Act:

Although for a few years prior to 1921 great numbers of patents were issued during the trust period without application by or consent of patentees, under an erroneous construction of the Act of 1906, the practice was discontinued, and the Office and the Department are endeavoring to remedy as far as possible conditions resulting from the unauthorized release of the property and to protect the interests of those to whom

patents were issued without warrant of law, and the lands are not beyond recovery.

Letter from Commissioner Burke to William Spotted Eagle (January 29, 1929).

In 1927 and 1931 Congress enacted the Cancellation Acts, 44 Stat. 1247, codified at 25 U.S.C. § 352a; and 46 Stat. 1205, codified at 25 U.S.C. § 352b, which allowed the Secretary of the Interior, in certain circumstances, to return patented land to trust status.³ Less than 500 forced fee patents were cancelled under these statutes, however.

In 1934 Congress enacted the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*), which extended the trust period indefinitely, stopped future allotments, restricted land sales except to tribes and generally sought to stabilize the tribal land base. The trust period has never expired.

-
3. The 1927 Cancellation Act allowed the Secretary to cancel: any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

The Cancellation Acts did not give the Secretary complete authority to cancel fee patents, however. Under the 1927 Act, the Secretary could not cancel fee patents where the patentee had "mortgaged or sold any part of the land." The 1931 Act permitted cancellation of fee patents as to those portions of allotments which had neither been sold nor mortgaged.

All of the cases before us arise out of similar facts. The appellants are descendants of Sioux Indians who were issued land allotments and then, before the twenty-five-year trust expired, received fee simple patents without application under the blood quantum policy. All the allottees later transferred or lost title to their property through sale or foreclosure.

II. DISTRICT COURT PROCEEDINGS

Fourteen cases are consolidated on appeal.⁴ Judge Bogue entered summary judgment in favor of the defendants in three consolidated cases.⁵ Judge Porter did the same in the remaining cases.⁶

Before Judge Bogue, appellants argued: (1) that they had a vested right to the full trust period; (2) that the Burke Act was inapplicable to them; (3) that the United States violated its fiduciary duty to them; (4) that the blood quantum policy was illegal; (5) that state foreclosures and county tax levies on the property were in-

4. Mr. Gottschalk, counsel for appellants, pointed out at oral argument that these cases are "test cases" for a number of similar cases existing nationwide, encompassing a total of about 1.5 million acres of land.

5. *Nichols v. Rysavy*, No. 83-5002; *Potter v. South Dakota*, No. 83-5033; and *Ecoffey v. Washabaugh County*, No. 83-5055, published at 610 F.Supp. 1245 (D.C.S.D.1985).

6. *Goins v. Assman*, No. 82-3079; *Bordeaux v. Hunt*, No. 82-3081; *Pritzkau v. Cottonwood Ranch*, No. 82-3082; *Pritzkau v. Larson*, No. 82-3083; *Bonser v. Shelbourn*, No. 82-3084; *LaPoint v. McCormick*, No. 83-3030; *Sanovia v. Handcock*, No. 83-3036; *Bordeaux v. Horn*, No. 83-3048; *Hastings v. Platte Valley Land Investment Co.*, No. 83-3067; and *Hastings v. Massa*, No. 84-3002. As the cases dealt with an identical issue, only *Bordeaux* was published, at 621 F.Supp. 637 (D.C. S.D.1985).

valid; and (6) that the current owners are illegally occupying the land. Judge Bogue based his decision primarily on the finding that the United States, an indispensable party, had not waived its sovereign immunity. He also found that the pertinent statute of limitations, 28 U.S.C. § 2401(a), had expired.

Before Judge Porter, appellants made essentially the same arguments, but without the allegations against the state and county. Judge Porter's opinion addressed the legality of forced patents. He found that the Secretary was within his authority when he issued fee patents without application, and that competency determinations on the basis of age and blood quantum, although "to modern eyes, reprehensible," were also within his authority. Judge Porter also ruled that the allottees consented to the premature issuance of the fee patents.

III. ISSUES ON APPEAL.

Three major issues are presented on appeal: (1) whether the forced fee patents were void; (2) whether the United States has waived its sovereign immunity; and (3) whether these actions are barred by a statute of limitations. We find it unnecessary to resolve the legality of the forced fee patents and the sovereign immunity issue, because the statute of limitations issue is dispositive.

IV. DISCUSSION.

A. Standard of Review.

This court clearly set out the standard of review of a district court's grant of summary judgment in *Kegel v. Runnells*, 793 F.2d 924, 926-27 (8th Cir.1986). We adhere to that standard in this case.

B. District Court Jurisdiction Under Section 345.

Appellants argue that 25 U.S.C. § 345 entitles them to bring this suit against the United States.⁷ Appellees' response addresses both appellants' interpretation of section 345 and the threshold question of the section's applicability.

Appellees first argue that district courts are vested with jurisdiction only with respect to suits for an "original allotment," *i.e.*, only if an Indian claims to have been unlawfully denied an allotment in the first instance does

7. 25 U.S.C. § 345, one of the jurisdictional bases for the district court in this case, reads:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

section 345 apply. Appellees cite *First Moon v. White Tail*, 270 U.S. 243, 245, 46 S.Ct. 246, 70 L.Ed.2d 575 (1926) for the proposition that section 345 did not confer jurisdiction over “disputes concerning the heirs of one who held a valid and unquestioned allotment.” This argument need not detain us long.

United States v. Mottaz, — U.S. —, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986), was decided after briefing and oral argument in this appeal. In *Mottaz*, an allottee’s heir inherited land whose title the United States held in trust. The government sold the land to the United States Forest Service, allegedly without her consent, pursuant to 25 U.S.C. § 483, which allowed the Secretary of the Interior “upon application of the Indian owners * * * to approve conveyances, with respect to lands or interests in lands held by individual Indians * * *.” She sued for the fair market value of the land. The district court granted the government’s motion for summary judgment based on 28 U.S.C. § 2401(a), the general six-year statute of limitations governing actions against the United States.⁸ On appeal, this court held in *Mottaz v. United States*, 753 F.2d 71 (8th Cir.1985), that no cause of action could accrue on a void transaction, and we remanded the case to the district court

8. 28 U.S.C. § 2401(a) states in pertinent part:

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

to determine whether the sale was in fact void, thus barring the United States' statute of limitations defense.

The Supreme Court granted certiorari and reversed on other grounds. The Court expressly declined to decide whether the six-year statute of limitations in 28 U.S.C. § 2401(a) applied to actions brought under section 345 of the Dawes Act, instead holding that the suit was within the scope of the Quiet Title Act, which applies where the United States claims an interest in the land. Thus the applicable statute of limitations was subsection (f) of the Quiet Title Act, 28 U.S.C. § 2409(a).⁹ The Court held that because the plaintiffs clearly had notice of the government's claim more than twelve years before filing suit, section 2409a(f) barred their claim. The Supreme Court nonetheless examined section 345 and stated:

Section 345 grants federal district courts jurisdiction over two types of cases: (i) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted. Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment * * * and suits involving "the interests and rights of the Indian in his allotment or patent after he has acquired it" (citations omitted).

Mottaz, 106 S.Ct. at 2231.

9. 28 U.S.C. § 2409a(f) states:

Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

We thus conclude, based on this clear language, that section 345 gives federal district courts jurisdiction over suits involving a claim to an already existing allotment.

Appellees also argue that section 345 did not vest the district courts in this case with jurisdiction because this suit is challenging Indian land policy. They cite *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 146 (8th Cir.1970), in which this court stated that section 345 "does not give federal District Courts the right to determine Indian land policy. (citations omitted). The Supreme Court recognized*** that 'judicial examination' would be necessary to separate right from policy. *Arenas v. United States*, *supra*, 322 U.S. [419] at 432, 64 S.Ct. 1090 [at 1095-96, 88 L.Ed.2d 1363 (1944)]."

Appellants respond that a question of right, not policy, is at issue here, and our judicial examination leads us to agree. Appellants' basic contention is that the forced fee patent scheme was illegal, and deprived them of a vested right to their allotments. Appellees cannot maintain that it was the Commissioner's policy to act illegally. We thus conclude that the district courts properly exercised jurisdiction over these cases.

Appellees next argue that section 345, which governs suits for "allotments," does not apply here because the parcels of land in question are no longer allotments. Appellees argue that because section 345 is thus inapplicable, the United States has not waived its sovereign immunity. This argument echoes Judge Bogue's finding in the district court.

Judge Bogue, in deciding that the United States retained its sovereign immunity from suit, first examined section 345 and its scope. He concluded that appellants' suit fell outside the scope of section 345 because it was "not an action for an allotment." 610 F.Supp. at 1252. Citing the definitions of "allotment" found in *Affiliated Ute Citizens of Utah v. United States*,¹⁰ and Cohen's Handbook of Federal Indian Law,¹¹ he reasoned that when appellants' decedents received their fee patents, the lands lost their status as trust lands and thus were no longer considered allotments. Judge Bogue concluded: "Applying the two definitions of allotments to the current situation, it is clear that § 345 does not apply because the action does not involve an allotment, but deals with land held in fee by the present owners. Therefore, § 345 is not a waiver of sovereign immunity."

To this reasoning, appellants respond that because the forced fee patent scheme was illegal, it was ineffective to terminate the trust, and despite the purported subsequent transfers, the land retains its status as trust land and section 345 applies. Appellants maintain that the "[district]

10. "Allotment is a term of art in Indian law. (citation omitted). It means a selection of specific land awarded to an individual allottee from a common holding. (citation omitted). Section 345 authorizes and provides governmental consent for only actions for allotments." 610 F.Supp. at 1252, *quoting* 406 U.S. 128, 142, 92 S.Ct. 1456, 1466, 31 L.Ed.2d 741 (1972).

11. "[An allotment describes] either a parcel of land owned by the United States in trust for an Indian ('trust' allotment), or owned by an Indian subject to a restriction-on alienation in favor of the United States or its officials ('restricted fee' allotment)."

F. Cohen, *Handbook of Federal Indian Law* 615-16 (1982).

court's reasoning was that since the court determined that plaintiffs should lose on the merits, the court therefore had no jurisdiction."

We need not resolve this issue, because assuming *arguendo* that these parcels are allotments despite the transfers, the statute of limitations in 28 U.S.C. § 2401(a) has run and bars this action as against the United States.¹²

-
12. Dictum in *Mottaz* suggests that even a clear finding that these parcels of land are allotments might nonetheless fail to waive the sovereign immunity of the United States. The Court stated:

Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment * * * and suits involving "the interests and rights of the Indian in his allotment or patent after he has acquired it" (citations omitted).

*The structure of § 345 strongly suggests, however, that § 345 itself waives the Government's immunity only with respect to the former class of cases: those seeking an original allotment. * * * Accordingly, in Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), this Court held that, to the extent that § 345 involves a waiver of federal immunity, as opposed to a grant of subject-matter jurisdiction to the district courts, that section "authorizes, and provides governmental consent for, only actions for allotments." 406 U.S., at 142, 92 S.Ct., at 1466.*

Mottaz, 106 S.Ct. at 2231-32 (emphasis added).

Even if this case were construed to involve an allotment, it is clearly an action "in relation to" the claimed right of an Indian to an allotment, rather than a suit "seeking the issuance of an allotment." Thus, as the Supreme Court suggests, even if these parcels are allotments, section 345 might nonetheless not waive the United States' sovereign immunity in this case.

C. Statute of Limitations.

28 U.S.C. § 2401 provides a general six-year statute of limitations governing suits against the United States.

Appellants, citing legislative history, argue that section 2401(a) is inapplicable. Section 2401(a) derives from 28 U.S.C. § 41(20) of the 1940 Code, which they contend did not limit actions by Indians concerning their right to allotments. They argue that because the 1948 revision creating section 2401(a) did not purport to change the law as to allotments, no such change should be inferred, quoting *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187, 199, 32 S.Ct. 626, 630, 56 L.Ed. 1047 (1912): "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." Appellants maintain that the sole purpose of the revision was to combine the time limit for contracts and torts into one provision. They conclude that a later, general statute of limitations has no effect on a prior, specific statute, particularly where Indian rights are involved. *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974).

Appellees, predictably, view the legislative history differently. They argue that section 2401(a) "not only served to consolidate the provisions of Section 41(20), the Tucker Act and Section 942 of Title 28 U.S.C., 1940 Ed., (footnote omitted) it also created a general statute of limitations insofar as suits against the United States are concerned." *Werner v. United States*, 188 F.2d 266, 268 (9th Cir.1951).

The Ninth Circuit has spoken clearly regarding the applicability of section 2401(a) to section 345 claims. The rationale in *Werner* was upheld in *Loring v. United States*, 610 F.2d 649, 650 (9th Cir.1979), in which section 2401(a)

was invoked to dismiss an allotment claim against the United States. Most recently, in *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir.1985), the Ninth Circuit, after examining the *Loring* and *Werner* decisions, stated that "we cannot escape the conclusion that section 2401(a) applies to *all* actions brought under section 345, whether the relief requested is legal or equitable."¹³

We follow the Ninth Circuit in holding that section 2401(a) applies to section 345 actions. We do so for the following reasons. First, the language of section 2401(a) is clear and definitive. "Absent a clearly expressed legislative intention to the contrary, [the] language [employed by Congress] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

Second, we note the arguments urged by *amici* and summed up in *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78, 8 L.Ed. 195 (1831):

The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed, where the enjoyment of its fruits is

13. In so concluding, the Ninth Circuit noted its awareness of *Sampson v. United States*, 533 F.2d 499 (9th Cir.1976), in which no statute of limitations was applied to a section 345 claim that had accrued in 1926. The court stated that "speculation as to any *sub silentio* ruling in *Sampson* on the inapplicability of section 2401(a) to section 345 actions is rendered unnecessary by the explicit holdings in *Loring* and *Werner*, to which we are bound." *Christensen*, 755 F.2d at 708.

uncertain; and litigation without limit produces ruinous consequences to individuals.

It remains to determine when the statute of limitations in section 2401(a) began to run. Appellants assert that because the section was amended in 1978, that is the pertinent date setting the statute running, and because all the actions under discussion were filed within six years of 1978, they are not barred.

We reject this argument. The 1948 version of section 2401(a) read, in pertinent part, as follows:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The 1978 revision added the following language:

Except as provided by the Contract Disputes Act of 1978; every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. (emphasis added).

The Contract Disputes Act of 1978 has no bearing on this suit. Thus the 1978 amendment wrought no changes upon the section's effect here.

It would be untenable to hold that the 1948 enactment of section 2401(a) instantly rendered appellants' claims time-barred, as all the claims had accrued some twenty-eight years previously. In *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 286 n. 23, 103 S.Ct. 1811, 1819, n. 23, 75 L.Ed.2d 240 (1983), the Supreme Court noted that "[t]he Constitution * * * requires that statutes of limitations must 'allow a reason-

able time after they take effect for the commencement of suits upon existing causes of action' '' (citations omitted).

Conversely, it would be unfair to hold that those suits accruing before section 2401(a) was enacted were not subject to a statute of limitations, while those suits accruing after the enactment of the section were subject to its strictures.

We therefore hold that the causes of action at issue here "accrued" when section 2401(a) was enacted. Thus appellants had six years from that time, June 25, 1948, in which to bring suit, which they have failed to do. Their actions are therefore time-barred.

Appellants finally argue that because the forced fee patents were void, no statute of limitations applies. They argue that because the Secretary exceeded his authority in issuing the fee patents, the patents were ineffective to terminate the trust. In this regard they cite this court's decision in *Mottaz v. United States*, 753 F.2d 71, 74 (8th Cir. 1985), *rev'd*, — U.S. —, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986). In *Mottaz*, we held that a cause of action cannot accrue on a void transaction, so that if the forced fee patents were void, the United States would have no statute of limitations defense.

We stated that "[i]t has been well established * * * that a sale of restricted allotment land in violation of the federal restrictions on its alienability does not transfer title, and that the allottee or her heirs may not be barred by state statutes of limitation or laches from bringing suit to establish that they retain title to the land." We noted, however, that "[t]he parties cite no case which squarely considered whether *Ewert* [*v. Bluejacket*, 259 U.S. 129, 42

S.Ct. 442, 66 L.Ed. 858 (1922)] prevents the application of *federal* statutes of limitation." We conclude that appellants' reliance on this case is misplaced for two reasons.

First, as noted, the Supreme Court reversed our reasoning in *Mottaz* after briefing and oral argument in this case. Although the Supreme Court declined to apply section 345 or section 2401(a) in *Mottaz*, a reasonable inference can be made that the Court intended a statute of limitations to be able to run on even a void transaction. The plaintiff in *Mottaz* alleged, as do appellants here, that the land sales were illegal and therefore void. The Supreme Court summarized:

The Court of Appeals ruled that such a claim could not be time barred. * * * [T]he Court of Appeals found that § 2401(a) "does not bar claims of title to allotments because *Ewert [v. Bluejacket]*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed.2d 858 (1922)] is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along."

Mottaz, 106 S.Ct. at 2228, quoting 753 F.2d at 74.

Although the Supreme Court reversed on other grounds, the Court's rejection of our holding is implicit in its holding that the statute of limitations in the Quiet Title Act barred the action. The Court held:

Congress has consented to a suit challenging the Federal Government's title to real property only if the action is brought within the 12-year period set by the Quiet Title Act. The limitations provision of the Quiet Title Act reflects a clear congressional judgment that *the national public interest requires barring stale chal-*

lenges to the United States' claim to real property, whatever the merits of those challenges.

Mottaz, 106 S.Ct. at 2234 (emphasis added).

By rejecting our reasoning that the case had to be remanded because the transactions were possibly void, the Supreme Court rejected our view that a statute of limitations could not run against a void patent.

Second, the facts governing the disputed land transfers in this case are significantly different from those in *Mottaz*. In our decision in *Mottaz* and the cases cited therein, the purported sales took place contrary to explicit statutory prohibitions against premature alienation. In this case, there is explicit statutory authorization for premature alienation. Appellants take issue not with the substance of the Burke Act itself, which is a federal statute authorizing alienation, but with what they contend is the Secretary's erroneous interpretation and application of that Act.¹⁴

This creates the dispositive distinction between the patents in *Mottaz* and the patents here: the former were possibly void, while these are possibly voidable.

The Supreme Court set out the distinction between void and voidable in *United States v. Schurz*, 102 U.S. (Otto) 378, 400-01, 26 L.Ed. 167 (1880):

14. Appellants also contend that because the allotments in South Dakota were made under the 1889 Act, rather than the 1887 Dawes Act, the Burke Act, as an amendment to the Dawes Act, never applied to South Dakota. Judge Porter disposed of this contention clearly and definitively in *Bordeaux v. Hunt*, 621 F.Supp. at 640-41. We can add nothing to his discussion on that issue and adopt it as our own.

But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. * * * The question whether any particular tract, belonging to the government, was open to sale, pre-emption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

* * *

The whole question is one of disputed law and disputed facts. It was a question for the land-officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

In *Proctor v. Painter*, 15 F.2d 974, 975 (9th Cir.1926), the court stated: "The question whether a patent from the United States for public lands is valid or invalid is not always one of easy solution. The Supreme Court has repeatedly held that patents for lands which have been previously granted, reserved or appropriated are absolutely void. (citations omitted). On the other hand, if the Land Department has jurisdiction to dispose of the land and to issue a patent therefor, an erroneous determination of the facts upon which the right to a patent depends, or an entire failure to determine such facts, will not avoid the patent."

Appellants' claim falls precisely within this second category, for they claim that the Secretary failed entirely to determine the facts necessary to trigger the issuance of their ancestors' fee patents; i.e., were the ancestors competent, and did they want a fee patent. Simply put, a fee

patent is void if the Secretary lacked the power to confer it. The fee patent is voidable if the Secretary had the power, but used it wrongly. Here, the power to confer the fee patents is in the Burke Act. Appellants' [sic] contend that the power was abused. The consequences of this distinction are clear. In *Schurz*, the Court stated at 401-02: "The mode of avoiding [the fee patent], if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong."

Because the fee patents at issue were not void, but possibly voidable, they were not the "nullity" that appellants propose, but were (if voidable) subject to possible nullification only upon the initiation of a suit. Because a suit was required to challenge their validity, the pertinent statute of limitations is applicable. Hence, section 2401(a) applies to appellants' claims.

Appellants argue, however, that 28 U.S.C. § 2415 waives the time limit in section 2401(a).¹⁵ Originally en-

15. 28 U.S.C. § 2415 states in pertinent part:

§ 2415. *Time for commencing actions brought by the United States*

(a) [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States * * * which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *. *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued * * *. *Provided*, That, for those claims

(Continued on following page)

acted in 1966, section 2415 provided a limitations period of six years and ninety days for suits brought by the United States on behalf of Indians. Claims that accrued before July 18, 1966, when section 2415 was enacted, were deemed to have accrued on that date. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1255, 84 L.Ed.2d 169 (1985).

In the 1982 amendment, the Indian Claims Limitation Act of 1982, Pub.L. No. 97-394, 96 Stat. 1976, Congress directed the Secretary of the Interior to publish in the Federal Register a list of all Indian claims to which the statute of limitations in section 2415 applied. The Act also directed the Secretary to notify Indians potentially interested in those claims. The Indians then could submit additional claims, which were published on a second list.¹⁶

(Continued from previous page)

that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim * * * .

* * * * *

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

16. Mr. Gottschalk, counsel for appellants, pointed out at oral argument that: "It was basically the result of the federal government initiating an inquiry into what possible claims might exist and be subject to [section] 2415, people became aware they might have actions and that was the impetus for the filing of these lawsuits."

Actions subject to the statute of limitations in section 2415 that were on neither list were barred unless begun within sixty days of the second list's publication. If the Secretary decides not to pursue a listed claim, "any right of action shall be barred unless the complaint is filed within one year after the date of publication [of the notice of the Secretary's decision] in the Federal Register."

"Congress [thus] intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf. Thus, we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations." *Oneida*, 105 S.Ct. at 1256. Appellants rely on this language to argue that their claims are not time-barred. They claim that "Congress knew that by definition all of the forced fee cases were based on actions prior to 1966. Therefore, 28 U.S.C. § 2415 either overrides § 2401 or it affects the time that the six-year period in § 2401 starts running, *i.e.*, from the date the rejection list in the 1982 amendments to § 2415 is published."

In deciding whether section 2401 is affected by section 2415, we are guided by familiar principles. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). We find no "clearly expressed congressional intention" in section 2415 to overrule section 2401 as applied to section 345 claims brought against the United States, and we find that the two statutes are capable of coexistence. Section 2415(a) and (b) begin as follows: "Subject to the provisions of section 2416 of this title, and

*except as otherwise provided by Congress * * **” (emphasis added). We find that Congress has clearly provided otherwise in section 2401(a).

Furthermore, as the Supreme Court stated in *Mottaz*, when confronted with this issue:

The Indian Claims Limitation Act of 1982, 96 Stat. 1976, which amended 28 U.S.C. § 2415(a), essentially tolls—for a time—the general 6-year statute of limitations for many damages actions that may be brought *by* the Federal Government on behalf of Indians. Respondent claims that § 2415 also shows that Congress did not intend the general 6-year statute of limitations for damages actions brought *against* the Federal Government, 28 U.S.C. § 2401, to apply to her claim. *But § 2415 is expressly inapplicable to actions “to establish the title to, or right of possession of, real or personal property.” 28 U.S.C. § 2415(c).*

Mottaz, 106 S.Ct. at 2232 n. 10 (emphasis both in original and added).

We therefore conclude that 28 U.S.C. § 2415 does not affect the running of the six-year statute of limitations in section 2401(a) in this suit.

Finally, we note that 25 U.S.C. § 347 is a possible independent source of limitation on appellants’ claims.¹⁷

17. 25 U.S.C. § 347 provides:

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has

(Continued on following page)

The South Dakota statute of limitations for recovery of title and possession of land and for rents or profits therefrom is twenty years. *See S.D. Codified Laws* §§ 15-3-1, 15-3-2, 15-3-7 and 15-3-10 (1984). Whether the time period is measured from the date of the allottees' deeds or from the last date on which they occupied the land, it has expired.

Because the statute of limitations in section 2401(a) bars this suit against the United States, we now turn to the argument that the United States is an indispensable party, and the suit must be dismissed in its absence.

D. Indispensable Party.

Appellants argue that the United States, even if protected from suit by section 345 or section 2401, is not an indispensable party, and the action may proceed without it. They cite *Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975), stating that the United States need not be a party where the action is one to protect trust land. They argue that complete relief is available without the United States, for the land could be returned to the allottees and damages paid. They claim no substantial risk of inconsistent obligations, because the United States has refused to sue on behalf of the allottees, thus making its position clear.

(Continued from previous page)

been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.

Judge Bogue held the United States to be an indispensable party, requiring dismissal of the entire action with prejudice pursuant to Fed.R.Civ.P. 19(b).¹⁸ Appellants, however, urge the following definition of indispensable party:

An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

Silver King Coalition Mines Co. of Nevada v. Silver King Consolidated Mining Co. of Utah, 204 F. 166, 169 (8th Cir. 1913).

Appellants argue that under this standard, an action to protect trust land may be brought in "equity and good conscience" without involving the United States. See *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir.1983), *cert denied*, 465 U.S. 1049, 104 S.Ct. 1324, 79 L.Ed.2d 720 (1984).

In deciding this issue, we are guided by the Supreme Court's decision in *Provident Tradesmens Bank & Trust*

18. This section requires us to look at the following factors in deciding whether to dismiss a suit:

first, to what extent a judgment rendered in the [United States'] absence might be prejudicial to [the United States] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the [United States'] absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Co. v. Patterson, 390 U.S. 102, 109-11, 88 S.Ct. 733, 737-39, 19 L.Ed.2d 936 (1968). The Court examined Rule 19(b) as follows:

Rule 19(b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled. * * * First, the plaintiff has an interest in having a forum. * * * Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. * * * Third, there is the interest of the outsider whom it would have been desirable to join. * * * Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

The Court noted that: "Whether a person is 'indispensable', that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. * * * [A] court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." *Id.* at 118-19, 88 S.Ct. at 742-43.

We followed this four-part test in *Fetzer v. Cities Service Oil Co.*, 572 F.2d 1250, 1253 (8th Cir.1978), and stated that "the Supreme Court [in *Provident Tradesmens*] rejected an inflexible and formulistic approach to joinder problems. The Court made it clear that Rule 19(b) requires a district court to undertake a 'practical examination of the circumstances,' 390 U.S. at 119-20, n.16, 88 S.Ct. 733 [743, n.16] in order to determine whether it

must dismiss the action or may 'in equity and good conscience' proceed without an absent party."

We therefore turn to an examination of the four factors as expressed in *Provident Tradesmens*. The first factor is the plaintiff's interest in a forum.

This factor obviously weighs in favor of appellants. The *Provident Tradesmens* Court stated at 109, n. 3 that "[T]he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." If the action is dismissed, "better joinder" in another forum would still be an impossibility regarding the United States. The principles regarding possible sovereign immunity under section 345 and the statute of limitations for suits against the United States under Section 2401(a) would still apply in another forum.

The second factor is the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for liability he shares with another. This interest meshes closely with the third factor, which requires us to consider the interest of the outsider whom it would have been desirable to join. In examining these two factors, we note that if appellants prevailed in this suit, the United States would be reinstated as trustee over the land, with the concomitant resumption of fiduciary responsibility, and could also be subject to claims for damages by the present owners. Furthermore, the result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy. If the United States issued the patents legally, then appellants' action is ground-

less. "In short the government's liability cannot be tried 'behind its back' " (citation omitted). *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375, 66 S.Ct. 219, 221-22, 90 L.Ed. 140 (1945).

As appellants point out, the United States need not be a party defendant in all section 345 cases, "because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various allotment acts." *Mottaz*, 106 S.Ct. at 2231 n. 9. For instance, where an Indian allottee sold land and did not receive bargained-for consideration, *cf. Vicenti v. United States*, 470 F.2d 845 (10th Cir.1972), *cert dismissed*, 414 U.S. 1057, 94 S.Ct. 561, 38 L.Ed.2d 343 (1973), such a dispute did not appropriately involve the United States. Another example is found in *Begay v. Albers*, 721 F.2d 1274 (10th Cir.1983), in which Indian allottees alleged that their allotments had been transferred by forged deeds. These cases sharply contrast with the present case, where the claim is based on the assertion that the United States wrongfully issued the fee patents. As this court stated in *Antoine v. United States*, 637 F.2d 1177, 1181 (8th Cir.1981): "The United States, as the allotting agent, is the appropriate defendant in suits involving the right to an allotment. In our view, determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States." As appellee South Dakota points out: "it seems absurd to argue, as the plaintiff does, 'for an order declaring that the United States still holds the allotment in trust for [appellants] and ordering the federal defendants to ensure the necessary records reflect such title,' * * * and then assert that the United States

is not indispensable.” We conclude that these two factors weigh heavily in favor of appellees, and dismissal of the action.

The fourth factor to consider is the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. In this regard, we note Judge Bogue’s observations that:

Thus, these forced fee patent claims have far reaching social, economic, and political ramifications * * *. Title to millions of acres of land is clouded, thus affecting real estate transactions, probate proceedings, and credit availability. In other words, thousands of landowners are effectively barred from selling their land.

Another ramification involves the validity of a fee patent issued by the U.S. Government. If these fee patents can be successfully attacked, the entire United States title system is in jeopardy. Title insurance companies, who relied on the fee patent, would face financial ruin. “The return of the land to trust status would potentially result in a checkerboard effect on civil and criminal jurisdiction, and would certainly remove the land from the tax base of the county and local school district.” *Quoting LaFave, 30 S.D.L.Rev. 60, 96 (1985).*

Nichols, 610 F.Supp. at 1254.

In view of the above, we conclude that this factor as well weighs in favor of dismissal of the action.

Examining these four factors, we conclude that the absence of the United States from this suit requires dismissal of the suit in its entirety, with prejudice, against all appellants.

Accordingly, we affirm the district courts' grants of summary judgment.¹⁹

19. We note independent grounds for dismissal of the suit against appellee South Dakota. In their amended complaint, appellants asserted a cause of action under 42 U.S.C. § 1983 against South Dakota. South Dakota asserted eleventh amendment immunity as an affirmative defense. Although neither issue was briefed by the parties, we find South Dakota's defense valid. Section 1983 provides a cause of action only against "person[s]." A state is immune from a section 1983 suit under the eleventh amendment. Appellants also impermissibly seek damages against South Dakota rather than the prospective injunctive relief contemplated by section 1983. See *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1260-61, 84 L.Ed.2d 169 (1985). Furthermore, in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that all section 1983 claims are governed by the appropriate state statute of limitations for personal injury actions. The appropriate statute in this case is S.D. Codified Laws 15-12-14(3) (1984), which runs three years after the cause of action accrues and thus has long expired.

App. 41

Katherine B. NICHOLS, Individually, and as Special Administratrix of the Estate of Amelia Huston Nichols No. 593, deceased, Plaintiff,

v.

Don RYSAVY, et al., Defendants.
Clover POTTER, Individually, and as Special Administratrix of the Estate of James Wilde, Plaintiff,

v.

STATE OF SOUTH DAKOTA, et al., Defendants.
Gladys ECOFFEY, Individually, and as Special Administratrix of the Estate of John Yellow Bird, Plaintiff,

v.

WASHABAUGH COUNTY, et al., Defendants.

Civ. Nos. 83-5002, 83-5033 and 83-5055.

United States District Court,
D. South Dakota, W.D.

May 10, 1985.

BOGUE, Chief Judge.

STATEMENT OF THE CASE

These three cases were consolidated pursuant to F.R.C.P. 42(a) for the purpose of determining motions to dismiss filed in each of the three forced fee patent cases.¹

-
1. Forced fee patent claims are based on the issuance of fee patents to Indian allottees without their application or express consent, and before the expiration of the standard 25-year trust period. Such patents were issued in two ways: 1) competency commissions declared an Indian allottee competent to assume full ownership of allotment; or 2) allottees of one-half or less Indian blood quantum were issued patents as a matter of policy. LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners Be Liable For Government's Wrongdoing?* 30 S.D.L.Rev. 60, 61 FN 5 (1985).

These three cases are actions to recover title and possession of former allotments on the Rosebud and Pine Ridge Indian Reservations from which the Plaintiffs claim to have been unlawfully denied and excluded and of which they claim to be entitled by virtue of acts of Congress. Plaintiffs further sue for injunctive declaratory relief against the federal Defendants (United States of America, James Watt, as United States Secretary of the Interior, and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs), claiming that the federal Defendants have breached their fiduciary duty imposed by law to protect and defend Plaintiffs' rights to the subject property and profits therefrom and ordering the federal Defendants to take all action necessary to protect and defend the Plaintiffs' rights to the subject property and the profits therefrom. In *Potter and Ecoffey*, the Plaintiffs also seek money damages from the federal Defendants. In addition, the Plaintiffs have sued certain non-federal Defendants.

In *Nichols*, the Plaintiff sued private defendants, Rysavy, *et al.*, (present and past owners/occupiers from July 15, 1943 to present) for damages for trespass, conversion and unlawful exclusion from the subject property, an accounting for rents and profits, and for injunctive relief to enjoin them from interfering with plaintiff's free use and enjoyment of the land.² Katherine Nichols is the Special Administratrix of the Estate of Amelia Nichols, Rosebud Sioux Allottee No. 593. Ms. Nichols is a daughter-in-law, not a lineal descendant of Amelia Nichols.

2. Nine title insurance companies jointly filed an amici curiae brief on behalf of the Defendants in *Nichols v. Rysavy*.

In *Potter*, the Plaintiff seeks money damages against the State of South Dakota, because South Dakota, through its Rural Credit Board, foreclosed against this property in 1927, and retained the mineral rights. The surface estate was later sold. The Plaintiff claims that the foreclosure and retention of mineral rights violated her civil rights under 42 U.S.C. § 1983. The Plaintiff also seeks an order declaring that the South Dakota state court judgment is null and void. Defendant Jacob Sharp is the present owner. No past landowners were joined in this action. Clover Potter is a lineal descendant and Special Administratrix of the Estate of James Wilde, Oglala Sioux Tribe, Pine Ridge Agency, Allottee No. 3759.

In *Ecoffey*, the Plaintiff seeks damages against Washabaugh County, claiming that the County violated her civil rights under 42 U.S.C. § 1983 by levying taxes on land upon which a void fee patent was issued. Washabaugh County levied taxes on the property in the amount of \$403.77 after the issuance of the fee patent. No past or present landowners were joined in this action. Gladys Ecoffey is a lineal descendant and Special Administratrix of the Estate of John Yellow Bird, Pine Ridge Allottee No. 4202.

In addition, each of the non-federal defendants in all three cases have cross-claimed against the federal government, seeking indemnification if they are held liable. In *Nichols*, Defendant Novotny has also filed a counterclaim against the Plaintiff seeking compensation for improvements made on the property.

HISTORICAL PERSPECTIVE

“The origin of the forced fee patent claims can be traced to the period in the administration of Indian affairs

known as the allotment period, 1887 to 1933." LaFave, *supra*, at 62. In South Dakota, this requires the examination of three Acts: 1) The General Allotment Act (Dawes Act) of 1887³, 2) Act of March 2, 1889,⁴ and 3) The Burke Act of 1906.⁵

A. GENERAL ALLOTMENT ACT (DAWES ACT) OF 1887

Under the Dawes Act, individual Indians received parcels of land, called allotments, title to which was to be held in trust by the United States for the benefit of the allottee for a period of twenty-five years. During the trust period, the land could not be sold, mortgaged or taxed. After expiration of the trust period, the allottees would receive an unrestricted fee patent to the allotment, along with full United States citizenship. Although the trust period was to have expired twenty-five years after the issuance of the allotment, the trust period was extended indefinitely by Congress, and has never expired. LaFave, *supra*, at 64 and 70.

B. ACT OF MARCH 2, 1889

An Act of March 2, 1889, divided the Great Sioux Reservation into several smaller reservations. This Act provided a scheme for allotments in Western South Dakota. This Act also incorporated Section 6 of the General Allotment Act (Dawes Act). Ch. 405, 25 Stat. 888.

3. Ch. 119, 24 Stat. 388 (Codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, and 381).

4. Ch. 405, 25 Stat. 888.

5. Ch. 2348, 34 Stat. 182 (Codified at 25 U.S.C. §349).

C. BURKE ACT OF 1906

The Burke Act of 1906, 25 U.S.C. § 349, amended Section 6 of the General Allotment Act. This amendment was enacted in response to two different situations. First, was the 1905 case of *Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), in which the U.S. Supreme Court declared Indians became citizens upon the initial issuance of an allotment. This meant that the Indians were subject to state law, particularly the sale of liquor. Second, was the increasing number of bills enacted by Congress authorizing the issuance of unrestricted fee patents prior to the expiration of the trust period to allottees who were specifically named in the legislation. LaFave, *supra*, at 65-66.

The Burke Act deferred citizenship until the allottee received a fee patent. More importantly, the Burke Act delegated to the Secretary of the Interior the authority to issue fee patents to allottees prior to the expiration of the trust period. 25 U.S.C. § 349.

After passage of the Burke Act, the Secretary of the Interior issued fee patents to Indian allottees who applied for such patents and were deemed competent (usually on the recommendation of the local Indian superintendent). This policy of issuing fee patents only to allottees who applied for them continued until 1916. LaFave, *supra*, at 66-68; Cohen, *Handbook of Federal Indian Law* 136-137 (1982).

In 1916, Secretary of the Interior, Franklin K. Lane and Commissioner of Indian Affairs, Cato Sells, established a new policy. Officials of the Department of the Interior were assigned to "competency commissions" and directed to visit reservations and determine whether indi-

vidual Indian allottees were competent. Fee patents were issued to allottees found to be competent by these competency commissions regardless of whether the allottee applied for a patent.

On April 17, 1917, the Department of the Interior's policy regarding the issuance of fee patents to allottees was modified further by a document entitled "A Declaration of Policy" issued by Commissioner Sells and Secretary Lane. Under the terms of the declaration, competency commissions thenceforward were to investigate only allottees of one-half or more Indian blood. Allottees of less than one-half Indian blood were to be given their fee patents without investigation. The declaration provided:

To all able-bodied adult Indians of less than one-half Indian blood, there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home. Indian students, when they are 21 years of age or over, complete the full course of instruction in the government schools, receive diplomas and have demonstrated competency will be so declared.

LaFave, *supra*, at 68.

In 1919, the policy of presuming that allottees of less than one-half Indian blood were competent was extended to include allottees with one-half Indian blood. *Id.*

In 1921, the newly-elected Harding Administration ended the policy of issuing fee patents to Indians without application. Charles H. Burke, the former congressman

from South Dakota and author of the Burke Act, became the Commissioner of Indian Affairs. On April 1, 1921, he announced that an application and examination of competency would be required for all allottees who received fee simple patents after that date.

Mr. Burke claimed that his policy was consistent with the original intent of the Burke Act, and that the previous administration's policy had violated the drafter's intent:

Although for a few years prior to 1921 great numbers of patents were issued during the trust period without application by or consent of patentees, under an erroneous construction of the Act of 1906, the practice was discontinued, and the Office and the Department are endeavoring to remedy as far as possible conditions resulting from the unauthorized release of the property and to protect the interests of those [sic] whom patents were issued without warrant of law, and the lands are not beyond recovery.

LaFave, *supra*, at 69 (citing Letter from Commissioner Charles Burke to William Spotted Eagle (January 29, 1929)).

[Mr.] Burke also offered recipients of forced fees, upon application to the Indian Office, an opportunity to request Department of Justice assistance in protecting tax payments or recovering land where tax deeds had been issued. Burke also supported a test case arising out of Idaho involving two Coeur d'Alene Indians who refused a forced fee patent. In *United States v. Benewah County* [290 Fed. 628], the Court upheld cancellation (sic) of the patent and return of the land to trust status. The authority of the Secretary of the Interior to cancel forced fee patents, provided the land had not been encumbered or sold, was codified in the Cancellation Acts of 1927 and 1931. [25 U.S.C. § 352a and 25 U.S.C. § 352b].

LaFave, *supra*, at 69.

In 1934, Congress enacted the Indian Reorganization Act.⁶ This Act "extended the trust period indefinitely, halted future allotments, restricted land sales, except to tribes, and attempted through various provisions to stabilize the tribal land base." *Id.* at 70.

HISTORY OF PLAINTIFFS' ALLOTMENTS

1. Amelia Nichols (*Nichols v. Rysavy, et al*)

On April 27, 1909, Amelia Nichols, a mixed blood member of the Rosebud Sioux Tribe, was issued a trust patent for Allotment No. 593. She signed a receipt for this allotment on July 29, 1914. On April 17, 1917, the Commissioner of Indian Affairs established a new policy whereby all allottees of less than one-half Indian blood would be issued a fee patent, whether or not they desired one. As a result of this policy, Amelia Nichols was issued a fee patent for Allotment No. 593 on December 29, 1917 by the Secretary of the Interior without her prior consent. She signed a receipt for the fee patent on January 30, 1918. Allotment No. 593 was subsequently conveyed by warranty deed by Amelia Nichols to C.E. Plummer on October 12, 1918 and by mesne conveyance to Defendant James Rysavy on July 15, 1943.

2. James Wilde (*Potter v. State of South Dakota, et al*)

On January 12, 1911, James Wilde was issued a trust patent for Allotment No. 3759 on the Pine Ridge Reserva-

6. Ch. 576, 48 Stat. 984 (Codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479).

tion. No receipt was found for this trust patent. James Wilde, like Amelia Nichols, had less than one-half Indian blood and was issued a fee patent for the allotment on April 13, 1918, without his prior consent. Mr. Wilde signed a receipt for the fee patent.

Mr. Wilde transferred the property to Grace Wilde by warranty deed on June 30, 1919. At that time the property was subject to two mortgages to the State Bank of Interior. James and Grace Wilde then mortgaged the land to South Dakota Rural Credit Board on April 27, 1920.

On May 5, 1925, Grace Wilde, by warranty deed, transferred the real property back to James Wilde. On July 16, 1925, Mr. Wilde wrote to the Commissioner of Indian Affairs requesting the fee patent be cancelled. The requested cancellation was denied.

On April 9, 1928, the State of South Dakota was issued a sheriff's deed for the property pursuant to a mortgage foreclosure proceeding. On October 2, 1940, the State sold the property to Clyde Sharp for \$4,500 stated consideration. At that time the State reserved all mineral interests pursuant to state law. The surface ownership was thereafter transferred on several occasions.

3. John Yellow Bird (*Ecoffey v. Washabaugh County, et al*)

John Yellow Bird was issued a trust patent for Allotment No. 4202 on January 12, 1911. Like the other Plaintiffs' Decedents, Mr. Yellow Bird had less than one-half Indian blood and was issued a fee patent for the allotment on September 29, 1918, without his prior consent. Mr. Yellow Bird signed a receipt for the fee patent. Prior to

Yellow Bird's conveyance to William Munger by warranty deed on April 28, 1923, Washabaugh County levied taxes on the property in the amount of \$403.77. Thereafter, other conveyances were made until title to the property ended up with Betty Isenbraun on April 16, 1981.

LEGAL ISSUES

The complexity of this case can best be expressed by the number of issues raised by the various motions to dismiss.

	<u>Nichols</u>	<u>Potter</u>	<u>Ecoffey</u>
1) Sovereign Immunity	X	X	X
2) Lack of subject matter jurisdiction	X		
3) Cancellation acts (25 U.S.C. §§ 352a and 352(b) are exclusive remedies	X	X	X
4) Plaintiff's decedent consented to issuance of patent	X		
5) Failure to join indispensable parties	X		
6) Laches/BFP/Equitable Estoppel	X	X	X
7) Action against SD barred by 11th Amendment		X	
8) Action against state pursuant to 42 U.S.C. § 1983 barred because state is not a person		X	
9) Statute of Limitations, 28 U.S.C. § 2401(a)	X	X	X
10) U.S. is an indispensable party which cannot be joined	X	X	X
11) Past and present owners are indispensable parties and cannot be joined		X	
12) Impermissible collateral attack on patent by a third party	X	X	X
13) Nonjustible (sic) political question		X	

App. 51

	<u>Nichols</u>	<u>Potter</u>	<u>Ecoifey</u>
14) Matter committed to agency discretion		X	X
15) Burke Act allows imposition of fee patents without application of allottee		X	X
16) 1917 rules of issuing fee patents without application to allottees of one-half Indian blood or less does not constitute denial of equal protection		X	
17) Failure to state claim—no constitutionally protected vested right to have an allotment held in trust for 25 years		X	X
18) State law bars claim	X	X	
19) Allottee consented to issuance of fee patent as a matter of law		X	X
20) 25 U.S.C. § 345 provides exclusive remedy	X		
21) Remedy of cancellation of fee patent not available	X		
22) Plaintiff lacks standing under 42 U.S.C. § 1983			X
23) Moot			X
24) 1917 rules which permitted issuance of fee patents without application are valid			X

However, due to the dispositive nature of this opinion, it was not necessary for this Court to discuss every issue.

DECISION

A. SOVEREIGN IMMUNITY

The first issue this Court must decide is whether the action against the United States is barred by the doctrine of sovereign immunity. It is well settled that the United

States may not be sued without its consent, and that only Congress can waive sovereign immunity. Wright, Miller and Cooper, *Federal Practice and Procedure* § 3654. "Moreover, if Congress in fact has consented to a particular kind of suit, it may define the conditions under which it is willing to be sued and the general rule long has been that the government's consent is to be strictly interpreted." *Id.*

The Plaintiffs, in their Complaint, make the following claim:

The consent of the United States to this action is . . . contained in 25 U.S.C. § 345 and 346. The United States has also consented to this action by officially notifying the heirs of [the Plaintiff] that it will not file this action as their trustee under 28 U.S.C. § 2415 and that they must file it on their own behalf.

25 U.S.C. § 345 provides that:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of

any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

Section 345 is a limited consent by the United States to suit. *Scholder v. U.S.*, 428 F.2d 1123, 1126 (9th Cir. 1970). Although this statute does waive sovereign immunity for certain cases involving allotments, the claims presented by the Plaintiffs fall outside the scope of 25 U.S.C. § 345 because the present action is not an action for an allotment.

As stated in Cohen, jurisdiction under § 345

includes actions by Indians to quiet title or recover possession of previously granted allotments or portions thereof, and to adjudicate other rights connected with beneficial ownership of the allotment. The statute does not confer jurisdiction to challenge administrative policies of the Department of the Interior, or jurisdiction over actions by non-Indians. Nor does it apply to Indian lands other than allotments. The basic requisite for jurisdiction is an issue covering Indian ownership of all or a portion of an allotment under federal restrictions.

F. Cohen, *Handbook of Federal Indian Law* 314 (1982).

The U.S. Supreme Court, in *Affiliated Ute Citizens of Utah v. United States*, defined the word "allotment" in the following manner:

Allotment is a term of art in Indian law. (citation omitted). It means a selection of specific land awarded

to an individual allottee from a common holding. (citation omitted). Section 345 authorizes and provides governmental consent for only actions for allotments.

406 U.S. 128, 142, 92 S.Ct. 1456, 1466, 31 L.Ed.2d 741 (1972).

Cohen provides a more useful definition of an allotment stating that an allotment describes "either a parcel of land owned by the United States in trust for an Indian ('trust' allotment), or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment)." Cohen at 615-616.

In this action, the Plaintiffs' decedents were issued trust patents. The Plaintiffs then allege that the Secretary of the Interior erroneously issued a fee patent to the Plaintiffs' decedents. When they received their fee patents, the lands lost their status as trust lands. *Larkin v. Paugh*, 276 U.S. 431, 439, 48 S.Ct. 366, 388, 72 L.Ed. 640 (1928). Thus the land is no longer considered an allotment. The land was later either sold or foreclosed upon, this transferring ownership of the land from the Plaintiffs' decedent to another person. The Plaintiffs now seek to have the land taken from its current occupants and returned to trust status. Applying the two definitions of allotments to the current situation, it is clear that § 345 does not apply because the action does not involve an allotment, but deals with land held in fee by the present owners. Therefore, § 345 is not a waiver of sovereign immunity.

The Plaintiffs also claim that the United States gave its consent by officially notifying the heirs of [the Plaintiffs' decedents] that it will not file this action as their

trustee under 28 U.S.C. § 2415 and that they must file it on their own behalf.

This claim is without merit. 28 U.S.C. § 2415 is a statute of limitations. Nothing in § 2415 provides a waiver of sovereign immunity. In order for this Court to have jurisdiction, there must be an express statutory waiver of immunity. *Champaign-Urbana News v. J.L. Cummins*, 632 F.2d 680 (7th Cir.1980). Section 2415 does not provide this waiver. Therefore, the United States is dismissed as a party in all three actions.

B. STATUTE OF LIMITATIONS

Even assuming that 25 U.S.C. § 345 does provide a waiver of sovereign immunity, the Defendants allege that the action against the United States would be barred by 28 U.S.C. § 2401(a). Section 2401(a) does apply to actions brought under 25 U.S.C. § 345. *Christensen v. U.S.*, 755 F.2d 705 (9th Cir.1985). Section 2401(a) provides that

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

However, if the patent is void, § 2401(a) would not apply to this action. See *Mottaz v. U.S.*, 753 F.2d 71 (8th Cir.1985).

A patent is void and inoperative if the government does not own the property, or has previously conveyed it, or if it is granted under a mistaken notion of the

law and without authority, or if the grant is directly contrary to the governing law, or if the land has previously been reserved, appropriated, or dedicated to uses which preclude its sale.

63A Am.Jur.2d Public Lands § 80.

The patent in this case was issued pursuant to the Burke Act of 1906, 25 U.S.C. § 349. This statute granted the discretionary authority to the Secretary of the Interior to issue fee patents to allottees he deemed competent and capable of handling his or her affairs. The Plaintiffs allege that the Burke Act never applied to tribes covered by the Act of March 2, 1889, and therefore, all of the fee patents are void. This argument is based on an analysis of other special allotment acts and rules of statutory construction. However, congressional intent indicates otherwise. The following exchange took place during the House debate of the Burke Act:

MR. FINLEY. Where are the Indians located who will be affected by this bill?

MR. BURKE of South Dakota. Mostly in the reservations of the country, if not entirely in the reservations.

MR. FINLEY. Within all the States and Territories? What Indians?

MR. BURKE of South Dakota. The *South Dakota Indians* probably more than others.

40 Cong.Rec. 3600 (March 9, 1906) (emphasis added). As stated in *National Woodwork Mfrs. Ass'n v. N.L.R.B.*, “[i]t is the sponsor we look to when the meaning of statutory words are in doubt.” 386 U.S. 612, 640, 87 S.Ct. 1250, 1266, 18 L.Ed.2d 357 (1967). Thus, it was the intent of Congress to have the Burke Act apply to South Dakota.

Therefore, because the patent was issued under the authority of 25 U.S.C. § 349, the patent is not void. Because more than six years have elapsed, this action is barred by 28 U.S.C. § 2401(a). Therefore, the United States will also be dismissed as a party in all three actions because of the statute of limitations contained in 28 U.S.C. § 2401(a).

C. INDISPENSABLE PARTY

The next issue this Court must decide is whether the United States is an indispensable party. F.R.C.P. 19(b) provides for the dismissal of the entire action if the United States is regarded as an indispensable party.

Upon examining the factors set out in Rule 19(b), it is clear that the United States is an indispensable party. The Plaintiffs wish to have the land returned to trust status, eject the present occupants, and seek damages. If this is accomplished, the United States would not only have trust responsibility over the land, but could also be subject to claims by present owners and the other Defendants for any damages caused by the issuance of the patent. In addition, the United States is the party who issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action.

Even if § 345 provided a waiver of sovereign immunity, the United States is an indispensable party in any action under § 345. *Antoine v. U.S.*, 637 F.2d 1177 (8th Cir. 1981). However, as stated in Section B, *supra*, § 2401(a) would bar the action against the United States, thus compelling the dismissal of the entire action. This Court cannot in good conscience let this action proceed without the United States as a party. Therefore, all three actions will be dismissed with prejudice as to all Defendants.

D. COLLATERAL ATTACK ON PATENT BY THIRD PARTY

The non-federal Defendants also argue that these cases should be dismissed because the Plaintiffs' complaints represent an impermissible collateral attack on a patent by a third party. In regard to a patent issued by the United States, the following well-established rules of law apply:

A patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which its holder can rely for peace and security in his possession. It is conclusive evidence of title against the United States and all the world, until cancelled or modified by an action brought for this purpose. 2 *The American Law of Mining*, § 1.29 at 357.

The issuance of the patent creates a presumption that all requisite steps and requirements of law and department regulations have been fully complied with. *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 35 S.Ct. 339, 59 L.Ed. 637 (1915).

A leading treatise states: . . . a patent which is regular in form and for whose issuance there is statutory authority is so binding on the government that a purchaser from the patentee need make no investigation as to the details of its issuance—the legal title has passed and the patent is conclusive against the government. 2 *Patton on Land Title*, § 292, pages 26, 27.

U.S. v. Eaton Shale Co., 433 F.Supp. 1256, 1267 (D.Colo. 1977).

The general rule is that "an attack on a patent generally may be made only in a direct proceeding by the government." 63 Am.Jur.2d Public Lands § 82. However, "a patent *regular on its face* and issued by the land depart-

ment within its authorized jurisdiction is conclusive and only subject to collateral attack on grounds that the patent is completely void.” *Phelps Dodge v. State of Arizona*, 548 F.2d 1383, 1386 (9th Cir.1977) (emphasis added). As stated in Section B, *supra*, the patents were issued within the discretionary authority of the Secretary of the Interior and therefore, are not void. Thus, the Plaintiffs’ complaints are impermissible collateral attacks on a patent by a third party. Therefore, all non-federal Defendants would be dismissed with prejudice for failure to state a claim even if the federal Defendants were not dismissed.

CONCLUSION

This Court feels compelled to address certain issues, although not dispositive, that are directly related to the forced fee patent claims. “It has been estimated that 9,500 forced fee claims affecting 1.5 to two million acres could be brought in the western United States. . . .” LaFave at 61. Thus, these forced fee patent claims have far reaching social, economic, and political ramifications that were not fully considered when 28 U.S.C. § 2415 was amended. Title to millions of acres of land is clouded, thus affecting real estate transactions, probate proceedings, and credit availability. In other words, thousands of landowners are effectively barred from selling their land.

Another ramification involves the validity of a fee patent issued by the U.S. Government. If these fee patents can be successfully attacked, the entire United States title system is in jeopardy. Title insurance companies, who relied on the fee patent, would face financial ruin. “The return of the land to trust status would potentially result in a checkerboard effect on civil and criminal jurisdiction,

and would certainly remove the land from the tax base of the county and local school district.” LaFave at 96. If the land were returned to the Plaintiffs, the government would “hold in trust for the benefit of the allottee’s heirs, fractionalized shares in the original 160-acre allotment.” *Id.* This would be a hollow victory for the Plaintiffs.

Meanwhile, non-federal defendants, innocent of any possible wrongdoing, face ejectment and thousands of dollars in attorney’s fees. Although this case does not fit the criteria so as to be classified as a political question, the forced fee patent claims cry out for a legislative solution, and not a judicial solution.

•

Shirley Lee BORDEAUX, Individually and as Special Administratrix of the Estate of Clara Hudson, No. 3196, Deceased

v.

Mary Ann HUNT, Estate of Lyle T. Hunt; Alvina Woockmann; the United States of America; Honorable James Watt, as United States Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Defendants.

Civ. No. 82-3081.

United States District Court,
D. South Dakota, C.D.

Nov. 14, 1985.

DONALD J. PORTER, Chief Judge.

CASE SUMMARY

This case is one of thirteen filed in this court between December, 1982 and January, 1984, dealing with an identical issue: whether Indian land formerly held in trust for plaintiff's ancestor, but which had been unilaterally taken out of trust by the United States and subsequently alienated by plaintiff's ancestor approximately sixty years ago, should be recovered from its present possessors and returned to trust status for the benefit of the members of plaintiff's family.

The court, having been the recipient of extensive briefing by the parties and by amici, and having considered carefully the contentions of all involved, finds that the removal of the land from trust status, while regrettable, was nonetheless legal. Plaintiff therefore has no valid

claim for recovery of the land, and summary judgment must be entered for defendants.

GENERAL FACTUAL BACKGROUND

The roots of this litigation lie in the General Allotment Act (Dawes Act) of February 8, 1887, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354 and 381). This Act provided that individual Indians should receive allotments, with title left in the United States in trust for the allottee for twenty-five years, during which time the allotment could not be sold, mortgaged, or taxed. Section 6 of this Act also provided that upon completion of the "allotments and the patenting of the lands to said allottees," the allottees would become citizens of the United States and subject to the laws of the state or territory in which they resided.

In South Dakota, the individual Indian reservations were created by the Act of March 2, 1889, Ch. 405, 25 Stat. 888. Individual allotments, very similar to those created under the Dawes Act, were authorized under Sections 8 through 11 of the 1889 Act. Section 11 also provided that "each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of" the Dawes Act.

The United States Supreme Court, in *Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), construed Section 6 of the Dawes Act as conferring citizenship upon Indians upon the initial issuance of an allotment. Under *Heff*, this made the Indians subject to state laws, including those dealing with liquor sales. Congress, in the Burke Act of 1906, Ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349)

moved to amend Section 6 of the Dawes Act to defer citizenship until issuance of the fee patent. Congress also enacted, as part of the same Act, the language which is at the heart of the present controversy:

Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . .

From 1906 to 1916, the Secretary of Interior implemented the Burke Act under a policy of granting fee patents to allottees who made application and were deemed competent, generally on the local Indian superintendent's recommendation. In 1916, the application requirement was withdrawn, and the Secretary began the issuance of patents after a government "competency commission" found individual Indians "competent." The requirements were loosened much further on April 17, 1917, with the promulgation of a document entitled "A Declaration of Policy":

To all able-bodied adult Indians of less than one-half Indian blood, there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home. Indian students, when they are 21 years of age or over, complete the full course of instruction in the government schools, receive diplomas and have demonstrated competency will be so declared.

Office of Indian Affairs, Dept. of the Interior, *Report of the Commissioner of Indian Affairs*, 4 (October 16, 1917).

The presumption of competence was extended further in 1919 to include adult allottees of one-half Indian blood. Large numbers of "forced" fee patents were issued under these policies, involving many thousands of allottees in the western United States. Abuses were rampant: it is clear from the historical evidence cited in plaintiff's brief that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed under the rule of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

The forced fee patent policy was halted in 1921, and Congress eventually moved to provide some relief to the patent holders in the so-called Cancellation Acts of 1927 and 1931, 25 U.S.C. §§ 352a, 352b. These allowed the Secretary of the Interior, in certain circumstances, to return the patented land to trust status, so long as the land was not encumbered or sold. Less than 500 forced fee patents were "cancelled" under these statutes.

SPECIFIC FACTUAL BACKGROUND

Plaintiff here is claiming under an allotment originally issued to Clara Hudson, a Rosebud Sioux Indian of one-half or less Indian blood. The trust patent was issued to her on April 27, 1909.

In response to the April 17, 1917, "Declaration of Policy," Assistant Commissioner E.B. Meritt provided the Secretary of the Interior, on October 16, 1917, with a list of Rosebud allottees of one-half or less Indian blood, including Clara Hudson, and noted:

As it appears from the record that all of the above named allottees [including Clara Hudson] have less than one-half Indian blood, it is respectfully recommended that the Commissioner of the General Land Office be requested to issue patents in fee to them for the lands set opposite their respective names and that the issuance of these patents be made special.

Assistant Secretary of the Interior S.G. Hopkins endorsed the proposal as follows:

I find from the evidence submitted that the allottees above named [including Clara Hudson] are qualified to care for their own affairs in a degree that entitles them to patents in fee covering the lands described above, and I, therefore, direct the Commissioner of the General Land Office to issue a patent in fee to them for the lands set opposite their respective names, and that the issuance of these patents be made special.

A fee patent was then issued in the name of Clara Hudson on December 29, 1917 for the subject land, although she evidently made no application for its issuance. The fee patent was delivered to her, and she signed a receipt for it on February 13, 1918.

Clara Hudson executed a mortgage covering the subject land on December 5, 1918, to W.H. Tackett. Consideration was listed as \$2,500. Clara Hudson then executed a warranty deed on July 8, 1919, covering the same land, to Fritz J. Huddin, acknowledging receipt of \$12,500 as con-

sideration. The grantee assumed the outstanding mortgage hereby.

DISCUSSION

I.

APPLICABILITY OF THE BURKE ACT TO SOUTH DAKOTA RESERVATIONS.

The argument has been advanced in this litigation that because the allotments in South Dakota were made under the 1889 Act, rather than the 1887 Dawes Act, the Burke Act, as an amendment to the Dawes Act, never applied to South Dakota. Thus, this argument proceeds, any issuance of a patent in South Dakota under the Burke Act was without authority and accordingly void. This argument is without merit.

Section 6 of the Dawes Act, the precise portion of that Act which was amended by the Burke Act, was incorporated in and made expressly applicable to South Dakota allotments by Section 11 of the 1889 Act.¹ As *Muenich v. United States*, 410 F.Supp. 944, 946 (N.D.Ind.1976) put it:

It is a basic rule of statutory construction that when one statute incorporates another by reference, an amendment to the incorporated statute operates as an amendment to the statute which incorporated the original act: "[W]hen a statute adopts the *general law* on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption . . ."

1. See the summary of these Acts cited in the General Factual Background, *supra*.

See *Sutherland Stat. Const.* § 51.07 (4th Ed.1984). (Emphasis supplied.) The foregoing rule does not apply to "limited and particular provisions", see *Sutherland, supra*, and plaintiff apparently contends that Section 6 of the Dawes Act is such a limited provision. Contrary to plaintiff's position, however, Section 6 of the Dawes Act, in setting forth the law as to the rights of all Indians "born within the territorial limits of the United States" and who had received allotments, was clearly intended by Congress to be the general law on its subject. As such, any later amendments to Section 6, including that made by the Burke Act, also became the general law on allottee rights, and as such, became incorporated in the 1889 Act and thus applicable to allotments in South Dakota.²

Further, even if it were doubtful whether the Burke Act applied to South Dakota allotments, all doubts would be resolved upon a consideration of the legislative history of the Burke Act. The Burke Act was proposed by, and received its name from, Representative Charles Burke, of South Dakota. The issue now before the court was raised during the debate of the Act:

-
2. The principal cases cited in support of the contention that the Burke Act does not apply to South Dakota are *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916) and *Seaples v. Card*, 246 F. 501 (E.D.Wash.1915). Neither are authority for this argument. *Nice*, which overruled *Matter of Heff, supra*, never addresses the Burke Act, and its silence can hardly be construed as a ruling on the applicability or inapplicability of the Burke Act in South Dakota. *Seaples* holds the Burke Act inapplicable to Indian *homesteads* granted under 1875 and 1884 Acts; these, unlike the 1889 Act creating South Dakota reservations, obviously did not incorporate the section of the Dawes Act dealing with *allotments* that was amended by the Burke Act.

Mr. FINLEY. Where are the Indians located who will be affected by this bill?

Mr. BURKE of South Dakota. Mostly in the reservations of the country, if not entirely in the reservations.

Mr. FINLEY. Within all the States and Territories? What Indians?

Mr. BURKE of South Dakota. The South Dakota Indians probably more than any others.

40 Cong.Rec. 3600 (March 9, 1906).

Plaintiff has offered no reason why the belief of the Burke Act's sponsor as to its applicability should have been incorrect, and the court perceives none. The Burke Act was clearly meant to, and in fact did, apply to allotments in South Dakota.

II.

NECESSITY OF AN APPLICATION FOR A PATENT UNDER THE BURKE ACT.

Plaintiff's next major contention is that the Burke Act contained a requirement for an application by the allottee before a fee patent could be issued, and that any patent issued in the absence of such application is necessarily void. The language of the Burke Act contains no such explicit requirement; indeed, in the context of another case, this court once observed that the codified version of the Burke Act, 25 U.S.C. § 349, was "one of a number of statutes enacted in the early portion of the twentieth century giving the Secretary unilateral power to either issue patents in fee to the Indian owners or to sell individual trust allotments to others." *Sampson v. Andrus*, 483 F.Supp. 240, 242 (D.S.D.1980). It is fundamental that

when a statute is phrased in plain language, a court need look no further than that language in the interpretation of the statute. *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917).³ Given the clear absence of the words "upon application" from the Burke Act, the court should ordinarily conclude from that alone that no such requirement can be implied. Given the magnitude and persistence of plaintiff's claims, however, the court, in the interest of reaching a final disposition of this controversy, will proceed to consider the other arguments dealing with the issue of the application requirement.

First, the court has been provided with copies of the legislative history of the Burke Act. There is no explicit discussion of an application requirement in this history; what remarks that can possibly be construed as bearing on this issue are conflicting and unpersuasive. The strongest language in support of an application requirement is the following exchange:

MR. DIXON of Montana: Mr. Speaker, I want to ask the gentleman from South Dakota [Mr. Burke] if the purpose of the bill is not to prevent the blanket Indians by wholesale become citizens by allotments, and still allow the intelligent Indians *on application* to become citizens by allotments?

3. As *American Bankers Insurance Co. of Fla. v. United States*, 265 F.Supp. 67, 73-74 (S.D.Fla. 1967), put it so well, it is

the duty of the Court to apply statutes on what Congress might have written Where the meaning of a statutory provision is clear, that language is the sole indication of legislative intent. Courts may not then resort to legislative history to aid in ascertaining Congressional intent. The statute, read with common sense, will be held to mean simply what it says and will be enforced as written.

MR. BURKE of South Dakota: That is the purpose of the law, and, further, to protect the Indians from the sale of liquor.

40 Cong.Rec. 3600 (daily ed. March 9, 1906). (Emphasis supplied). While the question it is true, does use the word application",⁴ it does not say that an allottee may *only* get a fee patent by making application; it says merely that Indians are "allowed" to apply. Indeed, just a few months earlier in the debate, the following remarks were made:

MR. MONDELL: Now, under this legislation the Indian remains the ward of the Government for twenty-five years after he takes his allotment, unless in the meantime *the Secretary of the Interior sees fit to make him a citizen by granting him a patent in fee simple.*

* * *

MR. CURTIS Now, this bill, if enacted, will leave [an allottee] under the control of the Government until he secures a patent conveying the fee, whether he gets it under an agreement or whether *it is issued to him* under the law by the Secretary of the Interior.

Id. at 3599. (Emphasis supplied). Although these statements certainly would not foreclose an application requirement in the Burke Act, the remarks, both in the absence of any reference to applications and in the very great discretion that seems to be attributed to the Secretary (particularly in Representative Mondell's "sees fit" language)

4. The reference to "blanket" Indians becoming citizens "wholesale . . . by allotment" is of course an allusion to the ruling in *Heff*, which found that Indians became citizens as soon as the trust allotment was initially issued.

tend to imply that the Secretary would have sufficient power under the Burkē Act to issue patents without applications,⁵ if that was the policy the Secretary chose to follow.

Further, although it is also not directly probative of the intent of Congress in the portion of the Burke Act at issue here, the court cannot overlook the Senate amendment added to the Burke Act, which provides, in pertinent part, that when an allottee died "before the expiration of the trust period, said allotment shall be cancelled . . . and the Secretary of the Interior . . . shall cause to be issued to [the] heirs . . . a patent in fee simple for said land." 40 Cong.Rec. 5805 (daily ed. April 25, 1906). While it may be true, as plaintiff contends, that the heirship problem was of a different nature than that dealt with by the rest of the Burke Act, it is yet significant that a clause giving the Secretary clearly unilateral power to terminate the trust period of an allotment was enacted with the rest of the Burke Act. Had Congress intended that the Secretary make such a crucial distinction between the two situations contemplated by the Burke Act, i.e., to require an application for a fee patent from living allottees while requiring no such applications from the heirs of deceased allottees, it would seem probable that Congress would it-

5. An argument might be made that Representative Curtis' remarks, cited *supra*, in employing the reference to an allottee "securing" a patent, imply an application. The word is used, however, both in the context of the patent being issued by the terms of the "agreement"—treaty or statute—creating the allotment, i.e., by the eventual completion of the twenty-five year trust period, as well as action by the Secretary under the Burke Act. There is thus no logical reason to read "secure" as equivalent to "apply".

self have made this distinction explicit in its drafting of the Burke Act.

Plaintiff argues that the 1906 Burke Act must be interpreted in the light of a proposed 1905 measure which failed to gain passage:

That hereafter the Secretary of the Interior be, and he is hereby, authorized to issue a patent in fee simple to any adult mixed-blood Indian to whom a trust or other patent has been issued, containing restrictions upon alienation, and upon the issuance of such patent in fee simple all restrictions as to sale, incumbrance, or taxation of the land so patented are hereby removed. *Provided*, that such patent shall not be issued until *after the said Secretary has carefully considered the application and is fully satisfied that the applicant is competent to transact his own business, and that it will be for his best interest to have the patent issued.*

39 Cong.Rec. 1155 (daily ed. January 20, 1905) (Emphasis supplied). All the court perceives from this failed legislation was that Congress knew how to put application language into this type of bill when that was its intent. This is amply demonstrated by a number of other statutes that were enacted into law during the same time period as the Burke Act. The Act of July 1, 1902, 32 Stat. 636, for instance, provided that the Secretary, upon "request" of an adult member of the Kaw tribe, could remove the restrictions on alienation if he was satisfied the Indian was competent. The Act of April 21, 1904, 33 Stat. 189, 204, empowered the Secretary to remove the restrictions on alienation on land held by members of the Five Civilized Tribes "upon application" and after investigation of the allottee. The Act of June 14, 1906, 34 Stat. 262, 263,

passed shortly after the Burke Act, authorized the Secretary "upon application" to issue a fee patent to Indians with land allotted in drainage districts. The Act of June 21, 1906, 34 Stat. 325, 353 (the Clapp Amendment) unilaterally removed restrictions on land held by adult mixed-blood Indians within the White Earth Reservation in Minnesota, and allowed the Secretary, "upon application", to remove restrictions on land held by full-blood Indians when he found them competent. The Act of June 28, 1906, 34 Stat. 539, 542, authorized the Secretary, upon a finding of competency and "at the request and upon the petition" of an allottee, to issue a fee patent to an Osage Indian. Application language also appears in the Act of May 29, 1908, 35 Stat. 444, dealing with sale of allotted land, and the Act of June 25, 1910, 36 Stat. 855, 856, also dealing with the removal of restrictions on alienation.

On the other hand, several other statutes from the same time period dealing with the same subject contain no application language. The Act of June 21, 1906, 34 Stat. 325, 381, gave the Secretary the power to grant a fee patent to any Indian of the Oneida Reservation, making no reference to an application. No application language appears in the Act of May 27, 1908, 35 Stat. 312, allowing the Secretary to remove restrictions on land held by members of the Five Civilized Tribes. The Act of June 25, 1910, 36 Stat. 855 at 855-856 and the Act of February 14, 1913, 37 Stat. 678 (amending the 1910 Act), codified at 25 U.S.C. §§ 372, 373, also authorized the Sec-

retary to issue fee patents to heirs of deceased allottees, with no mention of an application requirement.⁶

It is true that the case of *United States v. Benewah County*, 290 F. 628, 631-32 (9th Cir.1923), seems to state that the existence of application language in two other contemporaneous statutes dealing with fee patents required the court to read "upon application" into the Burke Act.⁷

-
6. It is also at least somewhat significant to note that Congress, at several times during this period, itself unilaterally removed restrictions on alienation. See the Clapp Amendment, cited *supra*; Act of June 21, 1906, 34 Stat. 325, 363; Act of May 27, 1908, 35 Stat. 312 (removing restrictions on basis of blood quantum of allottees of Five Civilized Tribes).
 7. The *Benewah County* court neglected to mention those contemporaneous statutes which also did not mention application language, and particularly did not mention the contemporaneous Amendment of Clapp of June 21, 1906, ch. 3504, 34 Stat. 325, 353, amended by Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1034 which unilaterally removed all restrictions on allotments held by adult mixed-blood Indians in the White Earth Reservation in Minnesota, and which was upheld in *United States v. First National Bank*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298 (1914). *First National Bank* stated, *inter alia*, that "the legislation here in question is not in the nature of contract, and contains no provision that makes it effectual only upon consent of the Indians whose rights and privileges are to be affected." 234 U.S. at 259, 34 S.Ct. at 850. This argues strongly against the general statutory requirement of application or consent for fee patents that *Benewah County* believed to exist.

Also, *Benewah County* makes the remark that the application requirement must be incorporated in the Burke Act "in light of the principles of law here involved", 290 F.2d at 631. This apparently alludes to the canon of construction, frequently urged by plaintiff, that provisions of Indian law are to be interpreted to give the maximum protection to Indian rights. But, as *Irving v. Clark*, 758 F.2d 1260, 1265 (8th Cir.1985), put it: "Highly malleable rules of statutory con-

(Continued on following page)

But the facts of *Benewah County* presented only the issue of whether land patented without application under the Burke Act retained its immunity from taxation. As will be discussed at Part III, *infra*, this is an issue entirely distinct from the issue of whether restrictions on alienation could be removed without application. Thus, any discussion by *Benewah County* of application requirements is not particularly applicable to the facts of this case. In any event, the *Benewah County* reasoning is contrary to the rule that a "change in the wording of a statute ordinarily imports a change of meaning unless a contrary intent plainly appears." *Altieri v. United States*, 295 F. Supp. 269 (Cust.Ct.1969) *see also Klein v. Republic Steel Corporation*, 435 F.2d 762, 765-66 (3rd Cir.1970): "where . . . the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." While it is true that this rule is not "decisive, or even strong . . . [and must be applied] only . . . when we compare very similar statutes", *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C.Cir.1981), this rule is still "some evidence of congressional intent", *Id.* Given the striking similarity of the Burke Act to the other contemporaneous statutes cited *supra*, some of which do, and some of which do not, require applications for fee

(Continued from previous page)

struction must have some limit, and the Supreme Court has also stated that "[l]egislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them,"'" citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979).

patents, the court must consider these other statutes as an additional indication that Congress did not intend the Burke Act to require an application from the allottee.

It has also been argued in behalf of the plaintiffs in these cases that the Burke Act, read in the context of the Dawes Act which the Burke Act amended, necessarily supports plaintiff's position. In plaintiff's view, the main purpose of the Dawes Act in establishing the allotment system was to create an express twenty-five year trust to protect the allottees. Plaintiff contends an interpretation of the Burke Act to allow the issuance of patents without an application necessarily assumes that the Burke Act was an implied repeal of the supposed main purpose of the Dawes Act. Implied repeals are, of course, disfavored by law, and plaintiff urges that Congress would have been unlikely to enact such "a complete reversal" of the policy of the Dawes Act with so little discussion. While it certainly cannot be denied that *one* purpose of the Dawes Act was to provide some protection to the allottee during the trust period,⁸ it must also be kept in mind that the Dawes Act, like other federal statutes during this period, was part of a

8. The exact nature of this protection is less clear than plaintiff would have this court believe. *United States v. Mitchell* (I), 445 U.S. 535, 543, 100 S.Ct. 1349, 1354, 63 L.Ed.2d 607 (1980), described it as a "trust . . . of limited scope." On *Mitchell's* remand, the Court of Claims noted that the "purposes of the special trust provision of the General Allotment [Dawes] Act . . . did not include a true fiduciary or guardianship relationship toward the Indian-owners." *Mitchell v. United States*, 229 Ct.Cl. 1, 664 F.2d 265, 275 n. 18 (1981), *aff'd*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*).

policy of encouraging the assimilation of Indians into the white man's culture This policy was carried out by "allotting" to individual Indians sufficient resources to enable them to become independent farmers and ranchers As stated in[a] Senate Report [in 1907]:

The policy of allotting Indian lands in severalty, so as to break up the old tribal relations, has been going on for years. Ultimately, the Indian must become a citizen and work upon the new lines necessarily created by his present environments. He must learn to farm, to raise livestock, and to abandon the aboriginal methods of life. Large areas of Indian lands have already been thus allotted, and many of the tribes have become farmers and stock raisers.

United States v. Overlie, 730 F.2d 1159, 1162 (8th Cir. 1984). Certainly, it was but a continuation of this policy to its logical conclusion to grant the Secretary of the Interior the power to determine, in his discretion, whether some Indians had advanced so far under the allotment system that it was time for the United States to relinquish its control over the allotment, and thus reach the final stage in "assimilating" the Indian to white society.⁹ The court can detect nothing in this policy and the part played in it by the Dawes Act, that would necessarily require an application by the allottee for a fee patent. Further, to the extent the Burke Act did constitute a departure from

9. See *County of Thurston, State of Neb.*, 586 F.2d 1212, 1219 (8th Cir.1978): The Burke Act "and similar enactments of the period were intended to accelerate the assimilation of the Indians by truncating the length of the trust period and the benefits derived therefrom for Indians determined to be competent", citing the Clapp Amendment.

the Dawes Act, Congress was clearly aware of this change. The court's attention has been directed to Representative Burke's remark in the debate that his Act "is in accordance, in my opinion, with what the original allotment law contemplated, and what was considered to be the law until the decision of the Supreme Court last April held otherwise", 40 Cong.Rec. 3600 (daily ed. March 9, 1906), alluding to *Heff, supra*. This means only that Burke intended to clarify the language of the Dawes Act which *Heff* had construed as granting citizenship upon the issuance of the initial trust allotment. But Burke also knew he was changing the law as shown by an exchange earlier in the debate:

MR. CRUMPACKER. Under the law as it now stands, the Secretary of the Interior does not have authority to issue fee simple patents to Indians whom he may conclude are entitled to them?

MR. BURKE of South Dakota. That is true.

Id. at 3599.

Nor is plaintiff's position supported by the portions of the legislative history which discuss the necessity to relieve Congress of the burdens of special legislation to grant fee patents to individual allottees by vesting this power in the Secretary. This purpose of the Burke Act is made clear by the House Report, itself written by Burke, accompanying the Act:

In the opinion of this committee this provision is advisable, as it will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it *places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such*

a stage of civilization as to be able and capable of managing his own affairs.

H.R.Rep. 1558, 59th Cong., 1st Sess., Feb. 21, 1906 at 2. (Emphasis supplied). This aspect of the Burke Act was very attractive to members of Congress; in the first discussion of the Burke Act on the floor of the House, the following typical observations were made:

MR. LACEY: I would like to say, in this connection, that the proposition of having a general law is superior to the present method. Under a general law the Indian Department would release the Indian and give him a patent with full authority as provided by the law through these special acts. *Now, by giving this privilege always through a special act and by naming the party in an appropriation bill there is much more danger that some name will slip in without being duly considered than there would be if the matter were handled by general law, because between the two Houses an amendment could be inserted on the floor of the House adding this name or that name, with little or no consideration. That could not occur if the matter were provided for by general law instead of in this special way.*

40 Cong.Rec. 3552 (daily ed. March 8, 1906) (Emphasis supplied.) The difficulty with this material is that it really proves little beyond the fact Congress wished to pass one of its burdens onto the Secretary of the Interior, who was more closely concerned with Indian affairs. Notwithstanding plaintiff's arguments to the contrary, nothing in this history suggests that Congress felt the Secretary should follow any particular method in carrying out his new powers, or that Congress would have necessarily disagreed with a Secretarial policy of granting fee patents without application on the basis of age and blood quantum,

methods that Congress itself occasionally utilized.¹⁰ See footnotes 6 and 7, *supra*, and the discussion of the Clapp Amendment in Part IV, *infra*. Congress did no more than determine that the Secretary was in the best position to decide when and how fee patents should be issued, and gave him the discretion to do so.

It is true that the Interior Department from 1906 to 1915, followed an administrative policy that, in effect, required applications for fee patents. It is argued that this supports plaintiff's position under the familiar rule that contemporaneous interpretation of a statute by the agency charged with its administration is evidence of the Congressional intent behind the statute, although plaintiff concedes that it is not "definitive" evidence. Yet, nothing in the letters and reports by Indian Commissioner Leupp and others in the years immediately following the passage of the Burke Act expressly state that the Act *mandates* applications or detailed investigations before the issuance of fee patents. Rather than any special awareness of Congressional intent, these materials merely reflect that, under the great discretion granted by the Burke Act, the Secretary at first chose to proceed with an application re-

10. H.R.Rep. 1558, cited above, also contains a copy of a letter from Indian Commissioner Leupp, praising the Burke Act for its potential in reducing the number of "wards of the Government", and stating that the "bill makes it the duty of the Secretary . . . to satisfy himself of the civic competency of the allottee concerned. Through [his officers] the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant." Significantly, even Leupp's remarks fall short of stating that no fee patent would be issued without an application, or that agents of the Secretary "must" investigate each case, using instead the more permissive verb "can."

quirement, just as the Secretary, after 1915, chose to dispense with the application procedure. Both methods seem to have been acceptable interpretations of the Burke Act, although the 1916-1921 interpretation actually appears closer to a strictly correct reading of the statute.¹¹

Thus, the court can find nothing in the extensive material relating to the Burke Act and its historical circumstances that would lead the court to add the words "upon application" to the plain language of the Burke Act. If such a language is to be implied in the statute, it must come from a source other than the statute itself.

III.

APPLICATION REQUIREMENT UNDER DUE PROCESS

Plaintiff argues that the allottee at issue in this case had a vested right under the Due Process Clause of the Fifth Amendment to the United States Constitution to have the restrictions on alienation kept on the allotment until the trust period ended by the expiration of the time

11. Some further arguments are made about Representative Burke's participation in the enactment of the portion of the Act of June 25, 1910, 36 Stat. 855, dealing with the removal of restrictions on alienation on Indian lands other than allotments. Plaintiff points out that the law, as enacted, contained application language. The legislative history, at 45 Cong.Rec. 6081 (daily ed. May 11, 1910) however, discloses that the language originally proposed by Burke contained *no* application language, but was later added by a Senate-House committee which included Burke. This evidence is thus inconclusive at best.

Also, the 1923 statement by Burke that he had intended his 1906 Act to require applications is too far removed in time to be probative.

under the governing statutes, or the allottee applied for a fee patent. This issue was thoroughly explored by the courts in the first half of this century, and the weight of authority is firmly against plaintiff's position.

The source of the law on this issue is the venerable case of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912). This considered whether the state of Oklahoma could levy property taxes on land allotted to Indians under an Act providing that the allotments would be restricted against alienation and exempt from taxes. In 1908, Congress enacted a statute which removed both the restrictions on alienation and the tax immunity of the land. The Supreme Court held that the tax immunity was a valuable property right, and as such was "protected from repeal by the provisions of the Fifth Amendment." *Choate, supra*, 224 U.S. at 678, 32 S.Ct. at 570. In so ruling, however, the Court expressly distinguished between the "right" of tax exemption and the restrictions on alienation:

the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation . . . The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant.

224 U.S. at 673, 32 S.Ct. at 568.

Several years later, the issue was again placed before the Court in *Williams v. Johnson*, 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358 (1915). There, it was argued "that the

restriction upon alienation was a protection to [the allottee] 'against his own improvident acts', that it was 'not a personal privilege and repealable', but was 'an incident attached to the land itself', and 'was to him property as much as the land itself.' " 239 U.S. at 419, 36 S.Ct. at 151. Rejecting this contention, the Court did no more than repeat the language from *Choate* cited above, and state that "Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation." 239 U.S. at 420, 36 S.Ct. at 152.

Similar reasoning was used by the Supreme Court in several cases after *Choate* and *Williams*. *United States v. Nice*, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192 (1916), for instance, remarked that

when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial.

Virtually identical language was used in *United States v. Waller*, 243 U.S. 452, 459-460, 37 S.Ct. 430, 431-32, 61 L.Ed. 843 (1917). *Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 199, 47 S.Ct. 338, 339, 71 L.Ed. 602 (1927), took the issue to be so well settled that the court made the statement that it "is not open to dispute that the removal by the later act of Congress . . . of the restriction upon alienation previously imposed, is valid." In fact, in *Fink v. Board of County Commissioners*, 248 U.S. 399, 404, 39 S.Ct. 128, 130, 63

L.Ed. 324 (1919), the Court actually took the view that the removal of restrictions on alienation, far from constituting a taking of a property right, actually added to the value of the land:

We may here invoke the commonplace for it is commonplace to say that we only know the value of a thing by that which makes its worth. Under the restriction against the alienation the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things,—a power of sale was conferred. To say there was no value in that power is to contradict the examples and estimations of the world.

The distinction between tax immunity and restrictions on alienation, and the differing power of Congress over the two aspects of trust allotments, has been generally observed by the lower courts. As *United States v. Benewah County*, 290 F. 628, 631 (9th Cir.1923), put it, there “can be no serious question of the authority of Congress to remove restrictions upon the alienation of the lands of allottees with or without the latter’s consent . . . But to remove restrictions upon alienation is a different thing from depriving Indian allottees of the immunity from taxation conferred upon them by their trust patents”.¹² Making much the same point are *United States v. Board of County Commissioners of McIntosh County*, 154 F.2d 600, 603

12. As noted above, *Benewah County* proceeded to read application or consent language into the Burke Act, a reading followed in *United States v. Ferry County*, 24 F.Supp. 399, 401 (E.D.Wash.1938). The outcome in *Benewah County*, in its determination that tax immunity survived on allotments after patents, was dictated by *Choate*, and the finding that an application was required under the Burke Act was therefore unnecessary to the court’s ruling.

(10th Cir.1946) ("It is well settled that restrictions against alienation and exemption from taxation of lands owned by Indians are separate and distinct subjects, not dependent upon each other."); *United States v. Hester*, 137 F.2d 145, 147 (10th Cir.1943) ("restrictions against alienation and non-taxability are separate and distinct subjects."); *United States v. Spaeth*, 24 F.Supp. 465, 468 (D.Minn. 1938) ("That Congress had the authority to remove the restrictions upon the alienation of the lands of the allottees under the trust patents before the expiration of the twenty-five year period cannot be questioned . . . while it was necessary to obtain the Indian's consent to divest him of the guaranteed non-taxable land during the twenty-five year period, it was not necessary to obtain his consent to clothe him with authority to alienate his land."); *United States v. Ferry County*, 24 F.Supp. 399, 401 (E.D.Wash. 1938) ("The Congress may remove restrictions to alienation with or without the consent of the allottees . . . but such is a clear distinction from depriving the allottees, without their consent, of the vested right to hold land free from taxation for 25 years."); see also *United States v. Getzelman*, 89 F.2d 531, 536 (10th Cir.1937) ("The power of Congress to impose, extend, or reimpose restrictions on property of an Indian ward is plenary and not open to doubt."); *Johnson v. United States*, 283 F. 954, 955 (8th Cir.1922) ("The purview discloses plainly and clearly a legislative intention to remove restrictions under given conditions; and we find no difficulty in sustaining both. . . .").

It is true that *State v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), takes a different view of the law in this area. *Zay Zah* was another case involving the Clapp Amendment, see

footnotes 6 & 7, *supra*, and the discussion under Part IV, *infra*, and the involuntary removal of restrictions on allotments in the White Earth Reservation in Minnesota by Congress. Contrary to the cases just immediately cited, *Zay Zah* reasoned that because the land at issue had retained, under *Choate*, its immunity from taxation during the trust period, it had also retained *all* of its trust aspects. "The vested right to be free from state taxation must derive from somewhere, and its only possible source was the trust patent itself. After all, it is the land which is exempt from property tax, not the individual who happens to own or possess the land at any given time." 259 N.W.2d at 584. "If the Clapp Amendment was ineffective to destroy the tax exemption during this period, it must also have been ineffective to destroy the legal source of that exemption, namely, the trusteeship established by the patent." 259 N.W.2d at 586. If the trust relationship was still intact, then, by implication, the restrictions on alienation still stood.

Bluntly put, *Zay Zah* is clearly wrong. The heavy weight of authority, from *Choate* and all its federal progeny, virtually all of which was ignored by *Zay Zah*, is that there *is* a distinction between tax exemption and the other trust attributes of an allotment, particularly the restrictions on alienation. As the Eighth Circuit has recently put it, commenting directly on *Zay Zah*, extension of *Zay Zah*'s reasoning beyond its facts, tax forfeiture of allotments, "may be erroneous in light of the long-standing distinction drawn by this Court and the United States Supreme Court that the Clapp Amendment was unconstitutional to the extent it attempted to end the tax exempt status of allotments so long as the trust status continued

... but constitutional to the extent it removed the restrictions on alienability of the allotment." *Spaeth v. United States Secretary of Interior*, 757 F.2d 937, 943 (8th Cir. 1985).

There can thus be no viable argument that, in designing the Burke Act to allow the Secretary to issue fee patents to Indians even in the absence of an application, Congress committed any constitutional violations. As the case law from *Choate* on down makes plain, restrictions on alienation are nothing more than a "limitation" on property, which may be removed whenever and in whatever method Congress may choose.¹³

IV.

COMPETENCY BY DETERMINATION OF AGE AND BLOOD QUANTUM

A second main thrust of plaintiff's case is that the Secretary could not permissibly make competency decisions under the Burke Act on the basis of age and blood quantum, and that all fee patents issued on the basis of such determinations are void. Plaintiff argues, initially, that the Burke Act requires what plaintiff calls an "individual" determination of competency. Precisely what is meant by "individual" is not clear. Certainly, there was an "individual" finding that each allottee met the age and blood standards. The language of the Act itself only

13. Even if an application or consent requirement were to be found in the Burke Act or the Constitution, a substantial argument can be made, see Part V of this opinion, that the facts of this case demonstrate consent to the fee patent by the allottee involved.

states that the Secretary "may, in his discretion . . . whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs," issue a fee patent. This language itself does not purport to lay down any standards that the Secretary is bound to follow in making this competency determination. As the analysis of the legislative history earlier in this opinion demonstrated, the intent of Congress seems to have been no more than to turn the burden of deciding when to issue fee patents over to the Secretary, and to give him very broad discretion in deciding the proper time and procedure to follow in making his decisions.

Perhaps the strongest authority for plaintiff in this respect is *United States v. Debell*, 227 F. 760 (8th Cir. 1915), which was an attempt by the United States to cancel a fee patent issued under the Burke Act in 1908, *before* the promulgation of the blood quantum test at issue in this case. In *Debell*, there was strong evidence of fraud and collusion to induce the Secretary to believe an Indian was competent under the standards then used, so that a fee patent might be issued and the Indian's land could be bought at less than its value. In considering whether the Secretary's competency decision had been valid, the court stated that a competency test under the Burke Act should have particular attributes:

It is indispensable to that competency and capability to manage his affairs which conditions the right of the Secretary to issue a patent in fee simple to an Indian under the [Burke Act] that he shall have at least sufficient ability, knowledge, experience, and judgment to enable him to conduct the negotiations for the sale of his land and to care for, manage, invest, and dispose of its proceeds with such a reasonable de-

gree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds.

227 F. at 770.¹⁴ *Debell* found that if the Secretary followed any other test, "he committed [an] error of law." *Debell* also found that the Indian involved in the case was indeed "incompetent . . . and that the patent in fee simple and the deed to the [original purchaser] were evasive violations of the settled policy of the nation to preserve and protect incompetent Indians." *Id.* Yet, the court refused to cancel the patent and return the land to trust status because it had already been sold to an innocent third party, stating that the original conveyance was "voidable, but it was not void because the United States had issued to [the Indian] its patent in fee simple." 227 F. at 771. "The title of a bona fide purchaser of land subsequent to the issue of the patent is superior to the equitable claim of the United States [acting in behalf of the Indian] to avoid it for fraud

14. See also *Ex Parte Pero*, 99 F.2d 28, 35 (7th Cir.1938), which stated that

under Section 349 it is obvious that the Secretary of the Interior in exercising his discretion to issue a patent in fee simple to a trust allottee ought to be satisfied not only that the allottee is competent and capable of managing his or her affairs, but also that it would be to the best interest of the allottee for the allottee to become emancipated from the exclusive jurisdiction of the United States and become subject to the laws of the state in which he resides.

This language is largely dicta, however, since no fee patent was actually issued in *Pero*, see 99 F.2d at 32, but instead involved was the issuance of a competency certificate under 25 U.S.C. § 372. In any event, *Pero*, which involved a question of state criminal jurisdiction, did consider the validity of a fee patent issued in violation of what the *Pero* court took to be the requirements under 25 U.S.C. § 349.

or error of law in the issue of it.” 227 F. at 763. (Emphasis supplied.) The point of *Debell*, and its significance for this case, is clear: whatever legal errors may have been made in a Secretarial competency decision under the Burke Act, even to the point of finding incompetent Indians competent, these errors do not rise to such a level as to render void the issuance of the patent, at least where, as here, the rights of innocent third party purchasers are involved. This conclusion is buttressed by *Mitchell v. United States*, 229 Ct.Cl. 1, 664 F.2d 265, 275 (1981), *aff’d*. 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983):

we deny entitlement to any recovery under 25 U.S.C. §§ 349 [the Burke Act], 377 . . . which deal with the issuance of fee patents to Indians found by Interior to be competent. Though the underlying land is held in a limited trust . . . this fee-patent legislation suggests little of the assumption of fiduciary responsibility The statutes seem almost purely regulatory, invoking Congress’s plenary power over Indians, and do not themselves mandate any compensation . . . for such alleged injuries as failing properly to determine whether or not an Indian was competent to obtain an allotment, or for issuing patents to incompetents despite the statute.

Regardless of the language in *Debell*, however, the court is of the view that the competency decision made by the Secretary in this case on the basis of age and blood quantum was within his legal authority. The central case on this issue is *United States v. Waller*, 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 843 (1917), decided April 9, 1917, just a week before the promulgation of the “Declaration of Policy” by which the Secretary undertook his policy of determining competency by blood quantum. This was an action in which the United States was seeking to can-

cel deeds made by Indians on the White Earth Reservation in Minnesota after the passage of the Clapp Amendment, which removed all restrictions on allotments held by adult mixed-blood Indians. In affirming the dismissal of the action, the Court held:

This distinction between the qualifications of adult mixed and full-blood Indians is one which Congress has not infrequently applied. . . . [The Clapp Amendment] thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the Act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands. This may be a mistake of judgment as to some cases. . . . But Congress dealt with general conditions, and with these classes of Indians as a whole, and, with authority over the subject, has given to adult mixed-blood Indians the full right to dispose of the lands in question. It is not for the courts to question this legislative judgment.

243 U.S. at 462, 37 S.Ct. at 433. *See also United States v. First National Bank*, 234 U.S. 245, 259-260, 34 S.Ct. 846, 849-50, 58 L.Ed. 1298 (1914) (also upholding Clapp Amendment; disastrous after-effects of legislation "can have little weight in determining the meaning of the legislation, and certainly cannot overcome the meaning of plain words used in legislative enactments. Congress has in other legislation not hesitated to place full-blood Indians in one class and all others in another."); *Tiger v. Western Investment Co.*, 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738 (1911); *United States v. Spaeth*, 24 F.Supp. 465 (D. Minn.1938).¹⁵

15. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) also upheld distinctions between tribal members.

Thus, plaintiff is asking this court to declare illegal a Secretarial policy upheld in several contemporaneous decisions by the United States Supreme Court. It is argued, of course, that the distinction between this case and those just cited is that here there is a policy promulgated by the Secretary of the Interior, while the policies in *Waller, supra*, *First National Bank, supra*, *Tiger, supra*, and *Spaeth, supra*, were enacted by Congress itself. It is much too late in the day for such a contention to carry any weight.

As the Supreme Court recently stated, when "Congress explicitly delegate[s] authority to construe the statute by regulation . . . we must give the regulations *legislative* and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, —, 104 S.Ct. 2769, 2776, 81 L.Ed.2d 680, 691 (1984) (Emphasis supplied.) Or, as *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977) put it: when Congress delegates to the Secretary the power to implement a statute,

Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations *with legislative effect*. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

(Emphasis supplied.) See also *United States v. Mersky*, 361 U.S. 431, 437-38, 80 S.Ct. 459, 463-64, 4 L.Ed.2d 423 (1960).

There can be no doubt that Congress had delegated to the Executive Branch the legislative power to promulgate

regulations to implement the Burke Act. The 1878 Revised Statutes contained the following provisions:

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * *

Third. The Indians. . . .

Sec. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

Sec. 465. The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.¹⁶

The effect of these statutes was interpreted in *United States v. Thurston County*, 143 F. 287 (8th Cir.1906). At issue there was the sale of trust lands by heirs of the original allottees under a 1901 Act, which sale was allowed under regulations promulgated by the Secretary of the Interior which imposed a condition that the proceeds be deposited in a bank. Stating that the "acts of Congress authorized the Secretary to make those regulations for the purpose of carrying into effect the act of 1902, and, when made, *they had the force of statutory enactments*," 143 F.

16. Clearly, this power to promulgate regulations could be and was delegated to the Secretary of the Interior and the Commissioner of Indian Affairs. See *United States v. Birdsall*, 233 U.S. 223, 34 S.Ct. 512, 58 L.Ed. 930 (1914).

at 291 (Emphasis supplied), the court cited Rev.St. §§ 441, 465.

Thus, when the Secretary promulgated his policies in 1917 and 1919 that adult mixed-blood allottees were presumptively competent within the meaning of the Burke Act, his rules took on the attributes of legislation, and carried the same weight as Congressional enactments. As such, this court can only set them aside if they were arbitrary, capricious, or plainly contrary to the Burke Act. This question does not long detain the court. As noted above, the blood quantum policy adopted by the Secretary was a virtual duplicate of that enacted in the Clapp Amendment, and specifically upheld by the Supreme Court, in *Waller, supra*. It is illogical for this court to find that, by incorporating standards used by Congress itself in determining whether Indians should be issued fee patents, the Secretary acted either arbitrarily or capriciously. Nor can the court find that this policy was plainly contrary to the Burke Act. The Burke Act did no more than to vest discretion in the Secretary to determine how and when fee patents should be issued. In promulgating the blood quantum method, the Secretary exercised his discretion, evidently guided by the wording of other statutes and Supreme Court case law of the time, to choose one such method. That this method appears, to modern eyes, ill chosen, and in fact resulted in disastrous consequences to many of the Indians involved, does not allow this court to find that it was contrary to the provisions of the Burke Act. The policy was as much a law as the Clapp Amendment, and just as *Waller* found the Clapp Amendment to be a legitimate exercise of federal power, so must this court uphold the blood quantum policy under the Burke Act.

The argument has also been advanced that the blood quantum policy violated the equal protection component of the Fifth Amendment to the United States Constitution. The court entertains severe doubts as to whether equal protection is relevant to this case, since prior to *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), equal protection standards were repeatedly held to be inapplicable to actions by the federal government. See *Detroit Bank v. United States*, 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304 (1943); *Currin v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939); *Charles E. Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). If equal protection is to be applied here, however, the test is that set forth in *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974): "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." See also *Delaware Tribal Business Committee v. Weeks*, *supra*, 430 U.S. at 84-85, 97 S.Ct. at 918-19.¹⁷

Morton v. Mancari upheld Indian preference in Bureau of Indian Affairs employment under 25 U.S.C. § 472, which has been implemented by 25 C.F.R. § 5.1, stating, in part, that "a preference will be extended to persons of Indian descent who are . . . (c) . . . of one-half or more Indian blood." The *Mancari* court looked to the purpose of the preference, as evidenced by the legislative history, and found

17. It is clear this test is applicable only "for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment"—not issues involving Congressional exercise of its power of guardianship. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 n. 28, 100 S.Ct. 2716, 2739-40, 65 L.Ed.2d 844 (1980).

it in the Congressional determination that "proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies." 417 U.S. at 553, 94 S.Ct. at 2484.

This purpose is not much different, in many respects, than that which underlay the Burke Act. As noted before, see footnote 10, *supra*, the letter of Indian Commissioner Leupp attached to the House report on the Burke Act, stated:

There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of burdens, while at the same time the number of 'wards of the Government' will be gradually reduced.

H.R. Rep. No. 1558, 59th Cong., 1st Sess., Feb. 21, 1906 at 4. This was entirely in agreement with the assimilationist views that dominated federal government policy at the time, see *United States v. Overlie*, 730 F.2d 1159, 1162 (8th Cir.1984), cited *supra*, and, to a considerable extent, the obligation recognized by the Supreme Court in *Mancari* "to prepare the Indians to take their place as independent, qualified members of the modern body politic", 417 U.S. at 552, 94 S.Ct. at 2483 citing *Board of County Commissioners v. Seber*, 318 U.S. 705, 715, 63 S.Ct. 920, 926, 87 L.Ed. 1094 (1943). Given these goals under federal Indian policy, this court cannot say that it was irrational, unwise though it may appear in retrospect, for the Secretary to determine that adult persons of one-half or less

Indian blood were no longer in need of federal controls over their land, and to grant them the same independent powers held by all other citizens of the United States. The decision appears at least as rational as the unquestionably legal, under *Mancari*, determination by the Secretary that merely because a person has one-half or more Indian blood, he is entitled to a preference in employment by the Bureau of Indian Affairs "to further the cause of Indian self-government". *Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484. The court therefore finds itself unable to disturb, on equal protection grounds, the policy decisions made by the Secretary in 1917 and 1919.

V.

CONSENT BY ACTIONS FOLLOWING ISSUANCE OF THE FEE PATENT.

The prior portions of this opinion set out the reasons which persuade this court to conclude that plaintiff has no valid cause of action for the issuance of a "forced fee" patent. Though the court does not rest its decision on this ground, the court is also convinced that the actions of the allottee under whom plaintiff claims do, in fact, evidence consent to the issuance of the patent, if such consent was necessary.

The sources for this post-issuance consent theory arise essentially from two separate sources: the so-called Cancellation Acts of 1927 and 1931, and case law dealing with payment of state taxes assessed on patented trust land in spite of the prohibition of such taxes under *Choate v. Trapp, supra*.

The 1927 Cancellation Act is codified at 25 U.S.C. § 352a:

The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued. (Feb. 26, 1927, c. 215, 44 Stat. 1247.)

The 1931 Cancellation Act is codified at 25 U.S.C. § 352b:

Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by sections 348 and 349 of this title, such patents to be effective from the date of the original trust patents and the land shall be subject to any extensions of the trust made by the Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this section and

section 352a of this title shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired. (Feb. 26, 1927, c. 215, § 2, as added Feb. 21, 1931, c. 271, 46 Stat. 1205.)

As can be seen from the language of both statutes, the word "consent" is used apart from, and in contrast to, the word "application." The reason for this is given in the House Report accompanying the 1927 Act:

Placing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax-exempt privileges of a trust patent, but where forced-patent land has neither been encumbered nor sold by the patentee, such patent ought to be canceled on application made to the Secretary of the Interior.

H.R. Rep. No. 1896, 69th Cong., 2nd Sess. 2 (1927). The power of the Secretary to return patented land to trust status was expanded in 1931 to include land, parts of which had been sold, or which had been mortgaged but the mortgage satisfied. In the view of Congress, however, this type of land could not be dealt with by only a cancellation of the fee patent, but required the issuance of a new trust patent entirely, implying that the sale or encumbrance had put the land in a category different from that where no such sale or encumbrance had occurred. This seems consistent with the indications in the legislative history of the 1931 Act that Congress had not retreated from its 1927 view of the effect of sale encumbrance:

MR. WILLIAMSON: The land that has been patented and has either been encumbered or sold by the Indian can not be reached. Nothing can be done in those cases, because, if a man mortgages or if he deeds, that is an equivalent to an acceptance of the patent and, so far as that land is concerned, the Indian is without recourse.

74 Cong.Rec. 3413 (daily ed. January 28, 1931). See also H.R.Rep. No. 2269, 71st Cong., 3rd Sess. 3 (1931), and the discussions of legislative history of these Acts, in *United States v. Frisbee*, 165 F.Supp. 883, 888 n. 4 (D.Mont.1958); and *United States v. Glacier County*, 74 F.Supp. 745, 747-748 (D.Mont.1947).

The taxation cases relevant to this issue are best typified by *County of Mahnomen v. United States*, 319 U.S. 474, 63 S.Ct. 1254, 87 L.Ed. 1527 (1943), yet another consideration of the ramifications of the Clapp Amendment. *Mahnomen* was an action by the United States to recover property taxes collected from an allottee who received a fee patent. In spite of the effect of the Clapp Amendment, as upheld in *Waller, supra*, in removing trust restrictions, the Court observed that the land retained its tax exemption under *Choate*. In spite of *Choate*, however, the allottee could still consent to give up even the tax immunity: "[a]cceptance of *Choate v. Trapp* does not mean that an Indian, legislatively declared to be competent to handle his own affairs, cannot voluntarily decide to pay taxes for his own advantage and welfare." 319 U.S. at 477, 63 S.Ct. at 1256. Citing *Ward v. Love County*, 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751 (1922), the *Mahnomen* Court said that "the burden is upon one seeking recovery of the tax to establish that the payment was made invol-

untarily", *Id.*, and because there was no evidence of involuntary payment in the record, the Court found the government not entitled to a recovery of the taxes.

Mahnomen's ruling differs somewhat from a series of earlier Ninth and Tenth Circuit cases, which basically hold that tax payments carry too many attributes of compulsion to be taken as indicia of consent to the issuance of the fee patent. *Board of Commissioners of Jackson County v. United States*, 100 F.2d 929 (10th Cir.1938); *Glacier County, Mont. v. United States*, 99 F.2d 733 (9th Cir.1938); *United States v. Lewis County*, 95 F.2d 236 (9th Cir.1938); *United States v. Nez Perce County*, 95 F.2d 232 (9th Cir.1938); *Board of Commissioners of Caddo County v. United States*, 87 F.2d 55 (10th Cir.1936); *United States v. Board of Commissioners of Commanche County*, 6 F. Supp. 401 (W.D.Ok.1934). To the extent these cases and *Mahnomen* are inconsistent, *Mahnomen* of course controls; yet even these Ninth and Tenth Circuit cases recognize the possibility of post-issuance consent to the fee patent. While noting that the Indian involved had neither mortgaged nor sold any part of his patented land, the *Nez Perce County, supra*, court reversed the district court's denial of the government's recovery of the property taxes paid by the Indian, and remanded for a specific finding on the issue of consent. Similarly, the parties in *Caddo County, supra* assumed that "the voluntary acceptance of a fee patent during the trust period operates to end the immunity", 87 F.2d at 56. The district court there, however, resolved the conflicting evidence to find there had been no consent. While recognizing that the fact that the allottee signed the receipt for the patent, her husband recorded the patent, and two mineral leases on the land were executed were

“facts and circumstances which argue persuasively that the patent was accepted”, 87 F.2d at 57, the court took the view that this was outweighed by the allottee’s testimony that she did not want the patent, and that the taxes on the land were paid under protest.

Other case law also supports the proposition that actions by the Indian involved can manifest consent. *See, e.g., Mottaz v. United States*, 753 F.2d 71, 75 (8th Cir.1985) (sale of fractional allotments on petition by some, but not all, owners: if non-petitioning owner “received payment for the land in 1955, then, on the facts of this case, we believe it may be assumed that she consented to the sale and thus that she does not have a cause of action.”); *Taylor v. Hearne*, 637 F.2d 689, 691 (9th Cir.) *cert. den.*, 454 U.S. 851, 102 S.Ct. 291, 70 L.Ed.2d 141 (1981) (“He recorded his title to parcel 24 one day after the government transferred it to him. Furthermore, he transferred his interest in the parcel to the Marquets in 1974, behavior that is inconsistent with any intention to reject the distribution.”); *United States v. Benewah County*, 290 F. 628 (9th Cir. 1923); *Morrow v. United States*, 243 F. 854, 855 (8th Cir. 1917) (the court stated the issue as whether land patented under the Clapp Amendment was “subject to state and local taxation, where the allottee has never attempted to avail himself of any power he might have under that amendment to alienate or incumber.”)

It is clear, then, that “[c]onsent depends on the facts and circumstances appearing in evidence in the particular case . . . While a mortgage or deed conveying a portion of the land does not in itself establish consent, it may constitute evidence that the patent had previously been ac-

cepted." *United States v. Frisbee*, 165 F.Supp. 883, 889 (D.Mont.1958). Indeed, sale or mortgage of even part of the patented allotment must be considered as strong evidence of consent to the patent. *United States v. Glacier County*, 74 F.Supp. 745, 748 (D.Mont.1947), explains it well, discussing an attempt by the United States to cancel the unsold portion of a fee patent:

[the allottee] conveyed the land by warranty deed which she could not have done without accepting and consenting to the patent as an indispensable basis of her act for such conveyance. In other words, she warranted the title and said by her warranty that she had good title to the land and a legal right to convey it. . . .

If she did not apply for the patent or consent to its issuance, how could she convey part of the land by warranty deed and consent to the patent to that extent and repudiate the patent as to the remainder of the land; the inconsistency is so great that the court will not attempt to solve it, and counsel for the Government have not done so, nor have they cited any authority in point to sustain their position. Mrs. Hall either consented to the issuance of the patent or she did not do so—the patent is an indivisible entity and can not be held good as to part of the tract of land conveyed and bad as to the remainder; it conveyed to Mrs. Hall her allotment in fee simple consisting of 320 acres.

Frisbee, *supra*, followed *Glacier County's* reasoning. *Frisbee* involved an action by the United States to recover 40 acres of a former allotment patented under the Burke Act which had been taken under a tax deed. The *Frisbee* court observed that the allottee had signed a receipt for the patent, recorded it a month later, and then executed mortgages for parts of the land other than the 40 acres later taken for taxes. Taxes were paid by someone on the 40

acres for one year. The allottee testified she did not want the patent, and had thought that she did not have to pay taxes on the land. The *Frisbee* court found the facts before it indistinguishable from those in *Glacier County*, and ruled that the allottee "must be held to have consented to the issuance of the fee patent." *Frisbee, supra*, 165 F.Supp. at 891.

Plaintiff contends that *Frisbee* and *Glacier County* are inapplicable here, apparently because of the court's patronizing discussion in *Glacier County* at 74 F.Supp. 748 comparing the allottee's appearance and intelligence to that of an intelligent white person. Plaintiff points out, correctly, that no such evidence is present in this record, but this court finds this factor insufficient to defeat the principles followed in *Glacier County* and *Frisbee*. Competency does not seem to have been actually considered as a pertinent issue by the court in either case,¹⁸ and in *Frisbee*, after an implied attack on the sophistication of the allottee, the court did no more than to state that the Indian involved "gave the impression of being of at least average intelligence." 165 F.Supp. at 890.

Further, while it cannot be denied that it would be useful to have more evidence of the circumstances under which the allotment at issue here left the possession of its

18. This may well have been because, as this court noted in its discussion of *United States v. Debell, supra*, errors made in determinations of competency do not render void the issuance of fee patents under the Burke Act. In any event, the allottee here was found, under legislative rules issued by the Secretary, see Part IV, *supra*, to be competent, just as the allottee in *Mahnomen* was legislatively found competent.

allottee-owner, the court is not convinced by plaintiff's argument that defendants have failed to put forward sufficient evidence of consent. Plaintiff contends that a heavy burden of proof must be cast on defendants on this issue, citing cases on waiver of constitutional rights, including *Rau v. Cavanaugh*, 500 F.Supp. 204, 207 (D.S.D.1980). It is not entirely clear that this doctrine is applicable to this issue, particularly in light of the implication in *Mahnomen, supra*, that the burden is on the person seeking to establish the continued existence of trust status to show the invalidity of the fee patent. In any event, plaintiff has cited no authority why this case should not be governed by the normal operation of Federal Rule of Civil Procedure 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Here, defendants, as part of their motions for summary judgment, have shown that plaintiff's allottee parted with his land for a consideration under either a deed of sale or a mortgage. This has been recognized as particularly persuasive evidence of consent to the fee patent by Congress itself in the legislative history to the Cancellation Acts, and by numerous cases cited in this portion of this opinion. Under Rule 56(e), plaintiff was obligated to produce "specific facts" showing why there was still an issue for trial. Plaintiff did not do so; plaintiff has

instead cited the court to incidents reported in the 1920's of Indians whose land was taxed in spite of *Choate*, and who either sold their land to avoid its being taken, or mortgaged it to pay the taxes. Also, the court has been shown instances in which allottees lost their land to unscrupulous merchants and speculators. Even an unquestioning acceptance of the truth of these reports, however, does nothing to show what actually happened in *this* case. All the court has before it is the conveyance of the land under a sale or mortgage by the allottee. In the absence of any other evidence, and given the legal precedent on the effect of a sale or mortgage, this court must conclude that the allottee here consented to the issuance of the fee patent. Plaintiff therefore has no claim under that allottee for the recovery of the land in question, and the court, were it to rest its decision on this ground, would have no hesitation in entering summary judgment for defendants for this reason as well.

 o

CONCLUSION

Before leaving this dispute, the court must join in the sentiments of the Western Division of this court in *Nichols v. Rysavy*, 610 F.Supp. 1245 at 1254 (D.S.D.1985): "the forced fee patent claims cry out for a legislative solution."¹⁹ While this court has found there to be no judicial merit to plaintiff's claims, the claims may well represent a "mor-

19. *Nichols* dismissed claims identical to those presented here, although on different grounds. This court also bases its decision today on the reasoning of *Nichols* as an additional bases for its holding.

al'' debt owed by the United States to the estates of Indian allottees injured by the forced fee patent policy described in this opinion.

Whether claims such as this shall become eligible for monetary compensation from public funds must depend upon whether Congress sees fit to establish an appropriate forum in which redress may be obtained. For the reasons given in this opinion, however, plaintiff's claims in this court in this action must be and are denied.

NO. 87-73

Supreme Court, U.S.

FILED

AUG 10 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KATHERINE B. NICHOLS, ETC.,
Petitioners,
v.
DON RYSAVY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT
STATE OF SOUTH DAKOTA

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Counsel of Record

John P. Guhin
Harold H. Deering, Jr.
Assistant Attorneys General
S.D. Office of Attorney General
Natural Resource Section
Room B-102, Anderson Bldg.
Pierre, South Dakota 57501
Telephone: (605) 773-3805
Counsel for Respondents

36872

QUESTIONS PRESENTED

1. Whether the United States is an indispensable party to an action pursuant to 25 U.S.C. § 345?

2. Whether the Secretary of the Interior, pursuant to the authority granted to him by the Burke Act, erred when he (1) issued patents in fee to Indians without their application or (2) incorporated a blood quantum standard in determining competency and in determining whether to issue patents in fee to Indians?

3. Whether, assuming the Secretary erred in issuing patents in fee without application or erred in utilization of the blood quantum standard, the patents in fee so issued were void or merely voidable; whether, assuming such patents in fee were void, the pertinent statutes of limitations nonetheless ran?

4. Whether 28 U.S.C. § 2401(a) or 25 U.S.C. § 347 provides authority to bar these actions at this date?

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
SUMMARY OF THE ARGUMENT	1
REASONS FOR DENYING THE PETITION	3
I THE COURT OF APPEALS CORRECTLY FOUND THE FEE PATENTS VALID.	
II THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES WAS AN INDISPENSABLE PARTY.	
III THE SECRETARY OF THE INTERIOR, PURSUANT TO THE BURKE ACT, COULD PROPERLY ISSUE PATENTS IN FEE TO INDIANS WITHOUT THEIR APPLICATION; THE SECRETARY OF THE INTERIOR DID, IN FACT, MAKE INDIVIDUAL DETERMINATION OF COMPETENCY BEFORE GRANTING THE FEE APPLICATIONS IN EACH CASE BEFORE THIS COURT.	
IV BOTH 28 U.S.C. § 2401(A) AND 25 U.S.C. § 347 BAR THIS ACTION AGAINST THE UNITED STATES.	
CONCLUSION	28

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Booth-Kelley Lumber Co. v. United States</u> , 237 U.S. 481 (1915)	9
<u>Bordeaux v. Hunt</u> , 621 F.Supp. 637, 649-650 (D.S.D. 1985)	21
<u>Heckman v. United States</u> , 224 U.S. 413 (1912)	11
<u>Hodel v. Irving</u> , ____ U.S. ____, 107 S.Ct. 2076 (1987)	7, 8
<u>In Re Emblen</u> , 161 U.S. 52 (1896)	9
<u>Lewis v. Marshall</u> , 30 U.S. (5 Peters) 470, 477-78, 8 L.Ed. 195 (1831)	24
<u>Little Bill v. Swanson</u> , 117 P. 481 (Wash. 1911)	25
<u>McKay v. Kalyton</u> , 204 U.S. 458, 469 (1907)	11, 14
<u>Minnesota v. United States</u> , 305 U.S. 382 (1939)	11
<u>Montana v. United States</u> , 450 U.S. 544, 559-560 (1981)	17
<u>Nichols v. Rysavy</u> , 610 F.Supp. 1245, 1254 (D.S.D. 1985)	5
<u>Nichols v. Rysavy</u> , 809 F.2d 1317 (8th Cir. 1987)	24, 25, 26, 28

	<u>PAGE</u>
<u>Poafpybitty v. Skelly Oil Co.,</u> 390 U.S. 365 (1968)	7, 8, 11
<u>Provident Tradesmens Bank & Trust Co. v. Patterson,</u> 390 U.S. 102 (1968)	7, 15
<u>St. Louis Smelting and Refining Co. v. Kemp,</u> 104 U.S. (14 Otto) 636 (1882)	9
<u>Tiger v. Western Investment Company,</u> 221 U.S. 286 (1911)	22
<u>United States v. First National Bank of Detroit, Minnesota,</u> 234 U.S. 245 (1914)	22
<u>United States v. Mottaz,</u> 476 U.S. _____, 106 S.Ct. 2224 (1986)	PASSIM
<u>United States v. Schurz,</u> 102 U.S. (Otto) 378, 400-01, 26 L.Ed. 167 (1880)	26
<u>United States v. Waller,</u> 243 U.S. 452, 462 (1917)	21, 22
 <u>FEDERAL STATUTES:</u>	
25 U.S.C. § 345	2, 12, 13
25 U.S.C. § 347	22, 25
25 U.S.C. § 349	2, 3, 17

PAGE

28 U.S.C. § 2401(a)	PASSIM
28 U.S.C. § 2415	24, 25

OTHER REFERENCES:

48 Fed.Reg. 13697-13920 (Mar. 31, 1983)	4
48 Fed.Reg. 51204-51268 (Nov. 7, 1983)	4
H.R. No. 1558, 59th Cong., 1st Sess. (1906)	17
1917 Annual Report of the Commissioner of Indian Affairs (1917 ARCIA)	19, 20



NO. 87-73

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KATHERINE B. NICHOLS, ETC.,
Petitioners,
v.

DON RYSAVY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT
STATE OF SOUTH DAKOTA

SUMMARY OF ARGUMENT

State of South Dakota argues herein that
the Secretary of the Interior's 1917 policy

of issuing fee patents to allottees without application was a valid exercise of his authority pursuant to the 1906 Burke Act. 25 U.S.C. § 349. Neither the plain language of the statute nor its legislative history in light of the contemporary context and contemporaneous statutes support the contention that an application was required.

Allottees received their allotments subject to the authority of the Secretary to terminate the trust relationship by issuing a fee patent. The 1917 Declaration of Policy was an appropriate exercise of that authority. Further, the Secretary did make a constitutionally valid determination of competency in these cases. The fee patents issued in these cases are not void.

The State contends that 25 U.S.C. § 345 does not constitute a waiver of the sovereign immunity of the United States. These cases are not ones for an allotment. Even if § 345

gives consent to sue, however, 28 U.S.C. § 2401(a) would bar the claim against the United States. The United States is an indispensable party under Fed.R.Civ.P. 19(b); because it cannot be joined, the entire action should be dismissed. The State respectfully submits that the petition should be denied.

REASONS FOR DENYING THE PETITION

I

THE COURT OF APPEALS CORRECTLY
FOUND THE FEE PATENTS VALID.

Some 65-70 years ago, the Secretary of the Interior, pursuant to the authority of the Burke Act, 25 U.S.C. § 349, issued some 10,000 fee patents to able-bodied Indian allottees over 21 years of age without application, based upon the quantum of Indian blood each person possessed. These patents became known as forced fee patents. The results of this policy later appeared less

than satisfactory, and in 1966 Congress set in motion a process for identifying a wide variety of potential land claims. The forced fee patent lands were included in a listing of potential Indian claims by the Department of the Interior in 1983. 48 Fed.Reg. 51204-51268 (Nov. 7, 1983); 48 Fed.Reg. 13697-13920 (Mar. 31, 1983).

The United States declined to litigate the forced fee patent claims. However, the results of the publication of the potential claims and subsequent litigation were far reaching.

Thus, these forced fee patent claims have far reaching social, economic, and political ramifications. . . . Title to millions of acres of land is clouded, thus affecting real estate transactions, probate proceedings, and credit availability. In other words, thousands of landowners are effectively barred from selling their land.

Another ramification involves the validity of a fee patent issued by the U.S. Government. If these

fee patents can be successfully attacked, the entire United States title system is in jeopardy.

Nichols v. Rysavy, 610 F.Supp. 1245, 1254 (D.S.D. 1985).

The holdings below remove that unwarranted cloud on the title to lands held by third parties pursuant to fee patents which were unquestioned for some 60 years. That the 1917 Declaration of Policy may be seen in an historical setting to be unwise, does not translate into a legal conclusion that it was illegal.

Contrary to Petitioners' claims, the holdings below neither validate illegal governmental action nor devastate the ability of Indians to protect their trust interests. What the Court of Appeals affirmed was that the federal government had the authority to issue the fee patents and that the lands in question were no longer trust lands.

Petitioners seek to call into question the validity of thousands of fee patents issued by the United States and justifiably relied upon by innocent third parties. The courts below appropriately determined that these actions could not in equity and good conscience, proceed in the absence of the United States.

Furthermore, the Petitioners are not without a forum before which to assert their claims against the United States. They can ask Congress for a resolution of such claims. That political forum is the appropriate place to deal with a federal policy that produced unsatisfactory results.

II

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE UNITED STATES WAS AN INDISPENSABLE PARTY.

- A. The determination of indispensability is consistent with prior decisions of this Court.

The Court of Appeals found that the United States was an indispensable party, in whose absence the actions should not be allowed to proceed. Petitioners do not dispute that the Court of Appeals applied the proper test in making that determination by utilizing the method prescribed by this Court in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). Rather, Petitioners claim that the Courts' application of the four part test set out in Rule 19(b) and elucidated in Provident Tradesmens, is somehow inconsistent with this Court's decisions in Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) and Hodel v. Irving, ____ U.S. ____, 107 S.Ct. 2076 (1987). Both cases are inapposite.

Poafpybitty was an action by allottees claiming a breach of an oil and gas lease. The lands in question were undisputedly trust lands, and there were no allegations of

impropriety or wrong doing by the United States. In short, the interests of the allottees and those of the federal government were not adverse or incompatible. The Court held that the allottees had standing to sue to protect their allotments, notwithstanding that the United States could also have brought such an action. There was simply no question before the Court in Poafpybitty as to whether the United States was an indispensable party.

Similarly, Hodel v. Irving involved a question of standing, not indispensability. The question was whether Indian heirs had standing to challenge the constitutionality of a federal statute which deprived them of fractional interests in trust property, by depriving their descendents to the right to pass the property at death. This Court held that the heirs had standing. There was no question before the Court as to whether the

United States was a proper party to the action.

In these cases, on the other hand, the crux of the dispute is whether the United States can be forced to reassume a trust with regard to property now held by third parties pursuant to fee patents. If a fee patent is voidable, it may only be set aside, if at all, in a direct action commenced by the United States. In Re Emblen, 161 U.S. 52 (1896). Booth-Kelley Lumber Co. v. United States, 237 U.S. 481 (1915). Collateral attacks by third parties are not permissible. St. Louis Smelting and Refining Co. v. Kemp, 104 U.S. (14 Otto) 636 (1882).

Petitioners seek to have lands currently held by thousands of non-Indians, pursuant to transfers deriving from a fee patent issued by the United States, returned to federal ownership and trust status. Petitioners claim that this should be done because of

allegedly illegal or constitutionally deficient activities undertaken by the Department of the Interior some 65 to 70 years ago. Petitioners seek not only damages from the United States, but also seek to have the federal government cancel long-standing fee patents, and take the property back into trust status, with the concomitant resumption of fiduciary responsibilities. Petitioners claim this can be accomplished without the United States as a party to the proceedings.

It is evident that Petitioners' claims are all based upon the assumption that the United States illegally issued fee patents to Petitioners' ancestors and still holds title to the land. Indeed the claims against the non-federal Respondents of trespass, wrongful possession, ejectment, and rents and profits all involve the question of which party is the owner of the real property in question.

Those issues need only be reached if Petitioners' claims against the United States are valid.

This is simply not an instance where the Petitioners and the United States share compatible goals as was true in Heckman v. United States, 224 U.S. 413 (1912) or in Poafpybitty. In fact the United States denies that it acted improperly in issuing the fee patents now under attack. These cases question whether the United States holds title to the property in trust. The prior decisions of this Court establish that the United States is indispensable to such a determination. See Minnesota v. United States, 305 U.S. 382 (1939); McKay v. Kalyton, 204 U.S. 458 (1907).

The Court of Appeals appropriately balanced the interests of the respective parties in making its determination of indispensability. The thrust of Petitioners'

assertion is that the Court of Appeals abused its discretion in weighing those respective interests. However, the determination made is not inconsistent with prior decisions of this Court, and is in fact supported by the relevant prior decisions.

B. The United States is indispensable under 25 U.S.C. § 345.

Petitioners also assert that 25 U.S.C. § 345 indicates that the United States is not indispensable, relying on the Court's recent decision in United States v. Mottaz, 476 U.S. ___, 106 S.Ct. 2224 (1986). Petitioners, quite simply, misread this decision:

Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment, . . . and suits involving "the interests and rights of the Indian in his allotment or patent after he has acquired it. . . ."

The structure of § 345 strongly suggests, however, that § 345 itself waives the Government's

immunity only with respect to the former class of cases: those seeking an original allotment.

United States v. Mottaz, 106 S.Ct. 2224, 2231 (1986). Petitioners do not seek "the issuance of an allotment"; therefore, the United States has not by 25 U.S.C. § 345 waived its immunity.

The Court of Appeals, however, found it unnecessary to reach the issue, assuming arguendo that the property in question met the allotment definition, and going on to decide that 28 U.S.C. § 2401(a) barred the action against the United States. What Petitioners urge here is that footnote 9 of the Mottaz decision indicates that the United States is never an indispensable party when the suit is one for other than an original allotment. However, footnote 9 only states that the United States might not be a proper party "in many private disputes that relate to land claims originally granted by various

allotment acts." Mottaz, 106 S.Ct. at 2231, n.9.

While Mottaz clearly limited the scope of S 345, the underlying principle discussed in McKay v. Kalyton, 204 U.S. 458, 469 (1907), remains applicable to the situation before the Court. Thus, when land is held in trust, or when the issue before the court is (as it is here) whether the title is held in trust by the United States, then the United States is clearly a "proper party" and, moreover, the issue of the ownership of such property is not a mere "private dispute." The issue is, instead, one which concerns the "harmonious and uniform operation of the legislation of Congress." 204 U.S. at 469.

Further, nothing in Mottaz indicates that the language of S 345 obviates the need for careful application of the four part test in Rule 19(b). On the contrary, Mottaz supports the application of the factors

discussed in Provident Tradesmens, especially in those cases where the action is not one seeking the issuance of an allotment.

The determination that the United States is an indispensable party was a correct one, and is consistent with prior decisions of this Court. To assert that it is inconsistent with a policy of protecting allotments is to beg the question. The issue is whether there is an allotment. The United States is an indispensable party to the determination of that issue.

III

THE SECRETARY OF THE INTERIOR, PURSUANT TO THE BURKE ACT, COULD PROPERLY ISSUE PATENTS IN FEE TO INDIANS WITHOUT THEIR APPLICATION; THE SECRETARY OF THE INTERIOR DID, IN FACT, MAKE INDIVIDUAL DETERMINATION OF COMPETENCY BEFORE GRANTING THE FEE APPLICATIONS IN EACH CASE BEFORE THIS COURT.

The Petitioners argue that (1) the Burke Act required the Secretary of the Interior to have in hand an application for a fee patent

before he could exercise his statutory powers and (2) that the Secretary of the Interior did not make an individual determination of competency before issuing the fee patents. Each of these arguments is fallacious.

A. No application for a patent in fee is required under the Burke Act.

In analyzing this contention, the historical context must, of course, be considered. The period at issue is generally referred to as the Assimilationist Era and the Allotment Acts were preeminently a part of that Era. This Court has said of the Allotment Acts that their "policy . . . was the eventual assimilation of the Indian population . . . and the 'gradual extinction of Indian reservations and Indian titles.' . . . The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal

relations." Montana v. United States, 450 U.S. 544, 559-560, n. 9 (1981) (citations omitted).

The Burke Act exemplified this policy as the specific language and history of the Act demonstrates.

Reference must first be made to the text of the statute which does not contain a requirement for an application by the individual Indian. Instead, the statute allows the Secretary to issue a fee patent to an Indian "in his discretion." 25 U.S.C. § 349. Second, the legislative history indicates that the bill:

places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization to be able and capable of managing his own affairs.

H.R. No. 1558, 59th Cong., 1st Sess. (1906), p. 2. Statutory authority, simply stated,

was vested in the Secretary and not in the individual Indian.

Third, Congress clearly knew how to demand an application for a patent in fee when it wished to do so. Congress did use application language in seven acts contemporaneous with the Burke Act.¹ In contrast, there were at least three contemporaneous acts in which no application language was used.²

In this context the failure to use application language in the Burke Act

¹(1) Act of July 1, 1902, 32 Stat. 636, 639-640. (2) Act of April 21, 1904, 33 Stat. 189, 204. (3) Act of June 14, 1906, 34 Stat. 262, 263. (4) Act of June 21, 1906, 34 Stat. 325, 353. (5) Act of June 28, 1906, 34 Stat. 539, 542. (6) Act of May 29, 1908, 35 Stat. 444. (7) Act of June 25, 1910, 36 Stat. 855.

²(1) Act of June 21, 1906, 34 Stat. 325, 381. (2) Act of May 27, 1908, 35 Stat. 312. (3) Act of June 25, 1910, 36 Stat. 855-856, amended, Act of February 14, 1913, 37 Stat. 678.

strongly militates for a conclusion that such language should not be added, as the Petitioners in effect urge, by judicial fiat.

B. An individual determination of competency was made.

Petitioners assert that the grants of the patents in fee to Indians were not valid because there was no "individual determination of competency."

In 1917, the Commissioner of Indian Affairs promulgated a new standard known as the 1917 Declaration of Policy. 1917 Annual Report of the Commissioner of Indian Affairs (ARCIA), p. 4.³

³The State of South Dakota has consistently argued that the 1917 Declaration of Policy constitutes a legislative rule and merits review as such a rule. See Boske v. Comingore, 177 U.S. 459 (1900); 1878 Revised Statutes §§ 441, 463, 465 as codified at 43 U.S.C. § 1457(10); 25 U.S.C. § 2; 25 U.S.C. § 9. See also United States v. Thurston County, 143 F. 287, 291 (8th Cir. 1906).

The Declaration (which built on a 1916 action) retained the earlier requirement that competency be determined on an individual basis but used a more objective standard than had been employed earlier. The Declaration required that to show competency a person must be (1) able-bodied; (2) less than one-half Indian blood; and (3) twenty-one years of age. 1917 ARCIA, p. 4. Once these highly objective indicators were met, the fee patent would be issued, although exceptions would be made if the Indian were deemed "manifestly incompetent." 1917 ARCIA, p. 5. Thus competency was determined on the basis of an individual objective standard tempered by a provision which would overcome the standard in certain circumstances. There clearly was an individual determination of competency. As noted by Chief Judge Porter at the trial level,

Plaintiff argues, initially, that the Burke Act requires what plaintiff calls an "individual" determination of competency. Precisely what is meant by "individual" is not clear. Certainly, there was an "individual" finding that each allottee met the age and blood standards.

Bordeaux v. Hunt, 621 F.Supp. 637, 649-650 (D.S.D. 1985).

Petitioners also argue, as a related matter, that the use of blood quantum was improper as a part of the Secretary's standard. The Petitioners thus ignore this Court's decision in United States v. Waller, 243 U.S. 452 (1917), decided just days before the promulgation of the 1917 Declaration of Policy. In Waller this Court upheld a congressional distinction between full blood and mixed blood Indians, stating

The distinction between the qualifications of adult mixed and full-blood Indians is one which Congress has not infrequently applied.

243 U.S. at 462. The Court went on to say "It is not for the courts to question this legislative judgment."⁴ Id. See also, United States v. First National Bank of Detroit, Minnesota, 234 U.S. 245 (1914); Tiger v. Western Investment Company, 221 U.S. 286 (1911).

An action of the Commissioner and the Secretary adopting a view harmonious with that of this Court should certainly not be struck down as improper seventy years after the action was taken.

IV

BOTH 28 U.S.C. § 2401(a) AND 25
U.S.C. § 347 BAR THIS ACTION
AGAINST THE UNITED STATES.

⁴See generally, Act of June 21, 1906, 34 Stat. 325, 353; Act of March 1, 1907, 34 Stat. 1034; Act of May 27, 1908, 35 Stat. 312. And see 25 CFR §§ 5.1(c), 20.1(n), 31.1(a), 152.5(c), 256.2(e)(3).

A. 28 U.S.C. § 2401 provides the statute of limitations in these cases.

28 U.S.C. § 2401(a) is the general six year statute of limitations governing actions against the United States. South Dakota contends that the statute ran long before the filing of these suits; because the United States is an indispensable party which cannot not be joined, the cases must be dismissed.

The Petitioners assert in response that 28 U.S.C. § 2401(a) may not be applied to the United States in this case, citing certain legislative history associated with the 1948 revision of the act. The Petitioners apparently claim that because Indian rights are at issue, the revision did not have any effect on them.

The Court of Appeals, however, rejected the Petitioners' reading of the legislative history. The Court of Appeals appropriately noted that the language of the statute is

"clear and definitive." 809 F.2d at 1327. The 1948 version of § 2401(a) read, in part, as follows:

Every civil action commenced against the United States shall be barred unless the complaint is filed within the six years after the right of action first accrues.

The 1978 revision added the language "[e]xcept as provided by the Contracts Dispute Act of 1978."

The language of the statute is certainly clear on its face and operates to bar these actions against the United States as untimely.

See also, Lewis v. Marshall, 30 U.S. (5 Peters) 470, 477-78, 8 L.Ed. 195 (1831) quoted at 809 F.2d 1327.

The Petitioners also argue that 28 U.S.C. § 2415 waives the time limit in § 2401(a).

However, because 28 U.S.C. § 2415 applies only to actions brought by the

federal government and this is an action against the federal government, and because it is inapplicable to suits to establish the title to property, 28 U.S.C. § 2415 is not determinative of this case. See Mottaz, 106 S.Ct. at 2232, n.10; Nichols, 809 F.2d at 1330-1331.

B. 25 U.S. § 347 provides authority for application of state statutes of limitations.

The Court of Appeals noted that a basis for the application of state statutes of limitations might be found in 25 U.S.C. § 347. See, Nichols, 809 F.2d at 1331. South Dakota strongly agrees with this suggestion. See, e.g., Little Bill v. Swanson, 117 P. 481 (Wash. 1911).

- C. The federal and state statutes of limitations have run even if it's assumed that the transaction granting the patents in fee were voidable or void.

Petitioners' arguments pivot on the assumption that transactions granting Indians title to their property in fee were void because they violated the Burke Act. South Dakota has vigorously responded that the transactions did not violate the statute.

In addition the State has argued that even if the transactions did violate the statute they were not void but merely voidable. The Court of Appeals would say at most that the patents in the cases before this Court were "possibly voidable." Nichols v. Rysavy, 809 F.2d 1317, 1330 (8th Cir. 1987). The distinction between void and voidable is well established. See United States v. Schurz, 102 U.S. (Otto) 378, 400-01, 26 L.Ed. 167 (1880). Moreover, the method of defeating a fee patent, assuming

voidability, is "by judicial proceedings to set it aside, or correct it if only partly wrong." Id. Because a suit was required to challenge the validity of these patents, the appropriate statute of limitations, i.e., 28 U.S.C. § 2401(a) was applicable and has run.

The Petitioners have argued, in essence, that the determination of the Court of Appeals with regard to voidness was wrong and that the transaction was void. They argue that no statute of limitations can run against a void patent.

In United States v. Mottaz, however, the Court reversed a ruling of a Court of Appeals that a case involving Indian land should be remanded because of the possibility that the transaction was void. By so doing, the Court rejected the view that a statute of limitations could not run against a void patent. It follows that the statute of limitations has long since run in this case

even assuming, arguendo, the voidness of the transactions at issue. See, Nichols, 809 F.2d at 1328-1330.

In sum, South Dakota argues that the Burke Act allowed the Secretary of the Interior to impose patents in fee without application and through use of a blood quantum standard. Even if the transactions were void or voidable, however, the pertinent statutes of limitations have run. There is no cause of action against the United States (or indeed against the private or state defendants) at this late date.

CONCLUSION

The commencement of this litigation has caused substantial unrest and uncertainty among people who have, in good faith, held land in fee for decades. The careful opinion of the Eighth Circuit Court of Appeals resolving these issues has fairly considered the claims of the Petitioners. This Court

should decline to grant certiorari to review
the Eighth Circuit's decision.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA

Harold H. Deering, Jr.
John P. Guhin
Assistant Attorneys General
Office of Attorney General
Natural Resource Section
Room B-102, Anderson Building
Pierre, South Dakota 57501
Telephone: (605) 773-3805

(4)
No. 87-73

Supreme Court, U.S.

FILED

AUG 21 1987

JOSEPH E. SPANOL, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KATHERINE B. NICHOLS, ETC., PETITIONERS

v.

DON RYSAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

CHARLES FRIED

Solicitor General

ROGER J. MARZULLA

Acting Assistant Attorney General

EDWARD J. SHAWAKER

MARIA A. IIZUKA

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

BEST AVAILABLE COPY

171P8

QUESTIONS PRESENTED

1. Whether the limitations period in 28 U.S.C. 2401(a) bars Indian petitioners' suits against the United States claiming that the Secretary of the Interior illegally issued certain fee patents to their forebears between 1916 and 1921.

2. Whether the United States is an indispensable party to petitioners' suits to recover land sold or mortgaged by their ancestors, where the gravamen of their complaint is that the original fee patents for the land were illegally issued by the United States so that all later transfers of the property were void.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:

<i>Antoine v. Washington</i> , 420 U.S. 194 (1975)	10
<i>Big Spring v. United States Bureau of Indian Affairs</i> , 767 F.2d 614 (9th Cir. 1985), cert. denied, No. 85-1380 (June 16, 1986)	9
<i>Blake v. Arnett</i> , 663 F.2d 906 (9th Cir. 1981)	10
<i>Block v. North Dakota</i> , 461 U.S. 273 (1983)	8, 13
<i>Christensen v. United States</i> , 755 F.2d 705 (9th Cir. 1985), cert. denied, No. 85-372 (June 16, 1986)	5, 9
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	9
<i>County of Thurston v. Andrus</i> , 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979)	2
<i>Fields v. United States</i> , 423 F.2d 380 (Ct. Cl. 1970)	10
<i>Heff, In re</i> , 197 U.S. 488 (1905)	2
<i>Hodel v. Irving</i> , No. 85-637 (May 18, 1987)	10
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903)	10
<i>Loring v. United States</i> , 610 F.2d 649 (9th Cir. 1979)	5
<i>Menominee Tribe of Indians v. United States</i> , 726 F.2d 718 (Fed. Cir.) cert. denied, 469 U.S. 826 (1984)	9
<i>Mottaz v. United States</i> , 753 F.2d 71 (8th Cir. 1985), rev'd, No. 85-546 (June 11, 1986)	4, 6, 7, 8, 10, 12, 13
<i>Northern Cheyenne Tribe v. Hollowbreast</i> , 425 U.S. 649 (1976)	2
<i>Poafpybitty v. Skelly Oil Co.</i> , 390 U.S. 365 (1968)	10
<i>Provident Tradesmens Bank & Trust Co., v. Patterson</i> , 390 U.S. 102 (1968)	6, 10, 11, 12
<i>United States v. King</i> , 395 U.S. 1 (1969)	8

IV

Cases — Continued:

	Page
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	8
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	2
<i>Walters v. Secretary of Defense</i> , 725 F.2d 107 (D.C. Cir. 1983)	9
<i>Werner v. United States</i> , 188 F.2d 266 (9th Cir. 1951)	9
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	10

Treaty, statutes and rule:

Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635	2, 10
Act of Mar. 2, 1889, ch. 405, 25 Stat. 888	2
Act of Feb. 26, 1927, ch. 215, 44 Stat. 1247, 25 U.S.C. 352a	3
Act of Feb. 21, 1931, ch. 271, 46 Stat. 1205, 25 U.S.C. 352b	3
Burke Act, ch. 2348, 34 Stat. 182, 25 U.S.C. 349	2, 6
Indian General Allotment Act, ch. 119, 24 Stat. 388, 25 U.S.C. 331 <i>et seq.</i>	1, 2, 5
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 <i>et seq.</i>	3
Quiet Title Act, 28 U.S.C. 2409a	8
25 U.S.C. 345	4, 5, 8, 9, 12
25 U.S.C. 347	10
28 U.S.C. 2401(a)	4, 5, 7, 8, 9
28 U.S.C. 2415	9, 10
Fed. R. Civ. P. 19(b)	10

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-73

KATHERINE B. NICHOLS, ETC., PETITIONERS

v.

DON RYSAVY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-40) is reported at 809 F.2d 1317. The opinions of the district courts (Pet. App. 41-60 and 61-107) are reported at 610 F. Supp. 1245 and 621 F. Supp. 637.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on January 15, 1987. A petition for rehearing was denied on February 25, 1987 (Pet. App. 1). Justice Blackmun extended the time for filing the petition for a writ of certiorari to July 10, 1987, and the petition was filed on July 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1887, Congress enacted the Indian General Allotment Act, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.*, in an attempt to encourage individual rather than tribal

ownership of land. The object of the Act was to foster assimilation of the Indians "as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). Under this statute, allotments were to be held in trust by the United States for a period of 25 years at the end of which time the allottee was to receive a fee patent.¹

In 1906, Congress amended Section 6 of the General Allotment Act by passing the Burke Act, ch. 2348, 34 Stat. 182, 25 U.S.C. 349. The Burke Act was intended "to accelerate the assimilation of the Indians by truncating the length of the trust period and benefits derived therefrom for Indians determined to be competent." *County of Thurston v. Andrus*, 586 F.2d 1212, 1219 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979). Two changes were made in the allotment system. First, an Indian allottee could not become a citizen until he received a patent in fee.² Second, the Secretary of the Interior was authorized, "in his discretion," to issue fee patents "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs * * *" (25 U.S.C. 349).

Between 1906 and 1916, the Secretary of the Interior granted early fee patents only to allottees who applied for them and who, on the recommendation of the local Indian

¹ Two years after the enactment of the General Allotment Act, the Great Reservation of the Sioux Nation, established under the Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, was divided into seven separate reservations. The Act of March 2, 1889, ch. 405, 25 Stat. 888, provided for the allotment of lands on the seven reservations and for the issuance of trust patents to individual allottees by incorporating Section 6 of the General Allotment Act.

² This change was made in response to the Court's decision in *In re Heff*, 197 U.S. 488 (1905), which had construed Section 6 of the Dawes Act as conferring citizenship on Indians upon the issuance of a trust patent, thus subjecting the Indians to state laws. In *United States v. Nice*, 241 U.S. 591 (1916), the Court overruled *In re Heff*.

superintendent, were found competent to receive them (Pet. App. 11). In 1916, however, a new policy began of issuing the fee patents without application whenever the allottees were found competent to receive them. The Department of the Interior established "competency commissions" to visit the reservations and issue these "forced fee patents." *Ibid.* In 1917, the Commissioner of Indian Affairs issued a Declaration of Policy under which Indians determined to be "able-bodied, adult [and] of less than one-half Indian blood" were presumed competent (*id.* at 12). In 1919, the presumption of competence was expanded to include Indians "of one-half Indian blood" (*id.* at 13). Thousands of Indians received fee patents under these policies (*ibid.*).

In 1921, the practice of issuing fee patents without prior application was discontinued, due in large part to an acknowledgment that the allotment policy had been unsuccessful. A later reexamination of that policy resulted in the passage of two "cancellation Acts" in 1927 and 1931. Act of Feb. 26, 1927, ch. 215, 44 Stat. 1247, 25 U.S.C. 352a, and Act of Feb. 21, 1931, ch. 271, 46 Stat. 1205, 25 U.S.C. 352b. These two Acts authorized the cancellation and return to trust status of certain fee patents that had been issued to Indians without application or consent. The Acts did not apply, however, to land that had already been mortgaged or sold by the allottees. The new federal policy with regard to Indian allotments was affirmatively expressed by the enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, which continued indefinitely the trust status of restricted lands.

2. Petitioners are all descendants of Sioux Indians who were issued land allotments under the General Allotment Act and then received "forced fee patents" for the land between 1916 and 1921. Each allottee subsequently sold the property or lost title through foreclosure. Pet.

App. 15. Petitioners filed 14 separate actions against the United States, the State of South Dakota and various private defendants seeking the return to trust status of the property which had been allotted to petitioners' ancestors. Petitioners challenged as void the issuance by the Secretary of the Interior of the fee patents for the property in question. They claimed, inter alia, that the patents had been issued in violation of the General Allotment Act because they were issued without prior application of the allottees and because individualized competency determinations were not made prior to issuance of the patents. Petitioners also challenged the Secretary's reliance upon the age and "blood quantum" of the allottee in determining competency as a violation of equal protection.

In three consolidated actions brought in the Western District of South Dakota, the district court dismissed the complaint as against the United States on the ground that the United States had not waived its immunity to suit under 25 U.S.C. 345, which allows Indian plaintiffs to sue the United States in order to receive an original allotment to which they claim entitlement, but does not waive immunity for suits "in relation to" allotments that have already been granted by fee patents (Pet. App. 51-55). Cf. *United States v. Mottaz*, No. 85-456 (June 11, 1986) slip op. 11 ("The structure of § 345 strongly suggests * * * that § 345 itself waives the Government's immunity only with respect to * * * [suits] seeking an original allotment.") The court further held that the suits were in any event time-barred under 28 U.S.C. 2401(a), which provides a six-year limitations period for "every civil action commenced against the United States" (Pet. App. 55-57). The court dismissed the actions against the remaining defendants on the ground that the United States was an indispensable party to the suits (*id.* at 57).

In the other eleven cases, consolidated in the Central District of South Dakota, the district court reached the merits and granted summary judgment for the defendants. The court held that the Burke Act did not require a prior

application by an individual Indian or an individualized determination of competency before a valid fee patent could be issued by the Secretary of the Interior (Pet. App. 68-81, 87-94); the allottees did not have a vested right under the due process clause of the Fifth Amendment to retain restrictions on the alienation of their allotments until the expiration of the trust period provided for in the General Allotment Act or until the allottees applied for fee patents (*id.* at 81-87); the use of age and blood quantum to determine the competency of individual allottees was not constitutionally infirm (*id.* at 95-97); and the actions of the allottees, including the subsequent sale of the property held under fee patent, constituted consent to the issuance of the fee patents (*id.* at 97-106).

3. The court of appeals affirmed the dismissal of all 14 cases in a single, consolidated appeal. The court held that the actions against the United States were time-barred and that the United States was an indispensable party to each of the suits. The court thus found it unnecessary to reach the additional issues of whether the United States had consented to be sued and whether the forced fee patents were legal (Pet. App. 16).

The court of appeals found the language of Section 2401(a) to be "clear and definitive," with no exception provided for Indian suits brought under 25 U.S.C. 345 (Pet. App. 24). The court accordingly agreed with the Ninth Circuit that the general statute of limitations applicable to civil actions against the United States applies to suits based on Indian allotments. See *Christensen v. United States*, 755 F.2d 705 (1985), cert. denied, No. 85-372 (June 16, 1986); *Loring v. United States*, 610 F.2d 649 (1979). Concluding that petitioners' causes of action had accrued no later than 1948, when 28 U.S.C. 2401(a) was enacted, the court of appeals held that petitioners' (or their ancestors') failure to bring the actions within six years of that date barred the suits (Pet. App. 26).

The court of appeals rejected petitioners' contention that because the forced fee patents were void ab initio, no

statute of limitations applied to their actions to reassert their rights under the original allotments. Petitioners, relying on the court of appeals' own decision in *Mottaz v. United States*, 753 F.2d 71, 74 (1985), rev'd, No. 85-546 (June 11, 1986), argued that a cause of action cannot accrue on a void transaction and that, since the Secretary exceeded his authority in issuing the fee patents, the patents were ineffective to terminate the trust created by the General Allotment Act. The court of appeals noted that although the Supreme Court did not apply 28 U.S.C. 2401(a) in *Mottaz*, "the Court's rejection of our holding [that a statute of limitations could not run against a void patent] is implicit in its holding that the statute of limitations in the Quiet Title Act barred the action" (Pet. App. 27).

The court of appeals further held that, in any event, the patents at issue here were not void but, at most, voidable (Pet. App. 28). "Simply put," the court explained, "a fee patent is void if the Secretary lacked the power to confer it. The fee patent is voidable if the Secretary had the power, but used it wrongly" (*id.* at 29-30). The Burke Act clearly granted to the Secretary the power to issue the fee patents. Petitioners, the court concluded, are simply arguing that he used that power wrongly. At most, therefore, the patents were voidable and required legal action, now time-barred, to challenge their validity. *Id.* at 30.

Applying the analytic framework set out by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-111 (1968), the court of appeals further concluded that the United States was an indispensable party to the litigation and that, therefore, the suits against the remaining defendants were properly dismissed. The court noted that the essence of each of these suits was "the assertion that the United States wrongfully issued the fee patents" (Pet. App. 38). The court distinguished this case from the "many private disputes that relate to land claims

originally granted by various allotment acts" (*Mottaz*, slip. op. 11 n.9) in which the United States is not an indispensable party. Here, the action of the United States in issuing the fee patents, not the subsequent fate of those patents, is in question. "[T]he result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy" (Pet. App. 37). Furthermore, "if [petitioners] prevailed in this suit, the United States would be reinstated as trustee over the land, with the concomitant resumption of fiduciary responsibility, and could also be subject to claims for damages by the present owners" (*ibid.*). Under these circumstances, the court concluded, "the absence of the United States from this suit requires dismissal of the suit in its entirety, with prejudice, against all [petitioners]" (*id.* at 39).

ARGUMENT

The court of appeals correctly concluded both that the suits against the United States were time-barred and that the United States is an indispensable party to this litigation. Those decisions do not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The language of 28 U.S.C. 2401(a) is, as the court of appeals concluded, both "clear and definitive" (Pet. App. 24). The statute provides:

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The Contract Disputes Act of 1978 has no bearing on this suit. Thus, there is no way for petitioners to avoid the all-inclusive language of the limitations period, applying as it does to "every civil action commenced against the United States."

Petitioners contend that Section 2401(a) contains an implicit exception for Indian suits brought under 25 U.S.C. 345. Their argument relies both on the historic fact that prior to the enactment of Section 2401(a) in 1948 no statute of limitations applied to such suits and on the special trust relationship that Indians have with the United States. Petitioners, however, are simply ignoring "[t]he basic rule of federal sovereign immunity," which is that "the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). "A necessary corollary of this rule" is that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity" (*ibid*). Such a condition must be "strictly observed, and exceptions thereto are not to be lightly implied" (*ibid*). Accordingly, before a court may find that Congress intended to exempt a particular litigant or cause of action from a general limitations period, there must be "clear indication of such an intention" (*ibid*). No such indication, clear or opaque, is to be found here.

In *United States v. Mottaz*, *supra*, this Court held that the 12-year limitations period in the Quiet Title Act of 1972, 28 U.S.C. 2409a, barred an ancient cause of action on land allotments brought by an Indian against the United States. The Court there declined to read an exception, either historical or equitable, into the clear language of the limitations period. "Federal law," the Court noted, "rightly provides Indians with a range of special protections. But even for Indian plaintiffs, '[a] waiver of sovereign immunity 'cannot be lightly implied but must be unequivocally expressed.' " Slip op. 16 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980), quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The same considerations apply to the suits in question here. Absent any expression of intent to provide an exception for Indian

suits brought under 25 U.S.C. 345, the all-inclusive limitations period in Section 2401(a) must be deemed to apply to such suits.

The precise arguments to the contrary made by petitioners were discussed and rejected by the Ninth Circuit in *Christensen v. United States*, *supra*. There, several Indians sought a declaratory judgment that the United States had an obligation to provide access over private land to their allotment, asserting that 28 U.S.C. 2401(a) did not bar their 20-year-old claim because the statute applied only to legal actions and, in any event, did not apply to Indian claims. The court of appeals held that 28 U.S.C. 2401(a) applied to both legal and equitable actions, and that, while prior to the 1948 changes in the Judicial Code Indian claims were treated differently, 28 U.S.C. 2401(a) "was not a mere codification of prior law, but also a revision" (755 F.2d at 707). See also *Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951) (Section 2401(a) "not only served to consolidate the provisions of [prior laws], it also created a general statute of limitations insofar as suits against the United States are concerned"). Accord *Walters v. Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983). The court of appeals also found no support for the argument that the six-year statute of limitations did not apply because of "the special trust relationship between the United States and American natives" (755 F.2d at 707-708). See also *Big Spring v. United States Bureau of Indian Affairs*, 767 F.2d 614, 616-617 (9th Cir. 1985), cert. denied, No. 85-1380 (June 16, 1986); *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir.), cert. denied, 469 U.S. 826 (1984).

Petitioners, citing this Court's decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), also argue that the limitations period imposed by 28 U.S.C. 2401(a) is "inconsistent" with 28 U.S.C. 2415 (Pet. 20).³

³ Originally enacted in 1966, 28 U.S.C. 2415 imposes a statute of limitations on various actions brought by the United States generally, including those on behalf of Indians.

The latter provision, however, has nothing whatsoever to do with this case. As this Court recently noted in *United States v. Mottaz*, slip op. 13 n.10, "[Section] 2415 is expressly inapplicable to actions 'to establish the title to, or right of possession of, real or personal property.'" Since the claims at issue here are "to establish the title to, or right of possession of, real * * * property," 28 U.S.C. 2415 does not apply.⁴

2. Petitioners contend (Pet. 12-17) that the court of appeals' conclusion that the United States is an indispensable party to this litigation conflicts "in principle" with this Court's decisions in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) and *Hodel v. Irving*, No. 85-637 (May 18, 1987). While both of those cases upheld the standing of the Indian plaintiffs to sue, neither of them has anything at all to do with the analytic framework for determining whether or not someone is an "indispensable" party within the meaning of Rule 19(b), Fed. R. Civ. P. That framework is clearly set out in this Court's decision in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. at 109-111, and the court of appeals was scrupulous in

⁴ Petitioners contend (Pet. 21) that the court of appeals also erred in citing 25 U.S.C. 347 as a "potential independent source of limitation" (Pet. App. 33-34). Petitioners are wrong in two respects. First, the allotment process on the Rosebud Reservation began with the Treaty with the Sioux Indians in 1868 and, thus, the Sioux allotments are within the statutory category of "lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States * * *" (25 U.S.C. 347). Second, and in any event, under the analysis employed by the Ninth Circuit in *Blake v. Arnett*, 663 F.2d 906, 909-910 (1981), construing this Court's decisions in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *Antoine v. Washington*, 420 U.S. 194 (1975), there is no significant distinction between a right secured by treaty and one secured by statute. See, e.g., *Fields v. United States*, 423 F.2d 380 (Ct. Cl. 1970) (applying 25 U.S.C. 347 to a claim dealing with an allotment under statute). Thus, the court of appeals was correct in concluding that 25 U.S.C. 347 provides an independent bar to petitioners' suits.

adhering to it. Petitioners' dispute is not with the test applied by the court of appeals, but rather with the weight given to the various factors present in this case. "The 'interests' that the Court found controlling," petitioners contend (Pet. 13), "do not warrant such weight." That fact-specific contention, even if it were otherwise cert-worthy, is incorrect in the circumstances presented here.

In *Provident Trademens Bank & Trust Co.*, this Court identified "four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled" (390 U.S. at 109): (1) the plaintiff's interest in having a forum; (2) the defendant's interest in avoiding multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another; (3) the interest of the party alleged to be indispensable; and (4) the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. *Id.* at 109-111. Petitioners' assertion (Pet. 13) that their interest in having a forum for their claims should be given "controlling weight" simply jettisons the other three-fourths of this inquiry.

The other defendants in this case are not alleged to have engaged in any wrongdoing. The legality of only the original grants of the forced fee patents is at issue in this litigation, not the subsequent transfers of the property by which the other defendants ultimately obtained it. Yet, if the plaintiffs were to prevail, these defendants would not only be faced with "multiple litigation" (in a suit to attempt to recover the value of their land from the United States) and the prospect of inconsistent relief (since the patents found invalid in one forum might prove valid in another); they would also be faced with the possibility of bearing "sole responsibility" for an alleged liability in which they should not share at all.

The interests of the United States are also at issue here since it is the alleged wrongdoing of the United States which forms the gravamen of petitioners' complaint and must inevitably be litigated in any suit against the remaining defendants. Petitioners' suit is first and last a suit against the United States, with inevitable consequences for the United States. For petitioners to prevail, the United States must be found to have wrongfully issued the patents, and the consequence of their prevailing would be that the United States would be reinstated as trustee of the lands in question with all the fiduciary responsibilities of a trustee. The United States would also be subject to the present owners' attempts to claim damages, and although the finding of liability in the first suit would not be res judicata against the United States "in the technical sense," it would "as a practical matter impair or impede" the ability of the United States to defend its actions on the merits (390 U.S. at 110). Such matters directly affecting both the liability and the responsibility of the United States should not be determined in litigation in which it is not a party.

Finally, there is the interest of the courts and the public generally in avoiding lengthy, piecemeal litigation in which the uncertainty cast upon thousands of land titles by these suits would be unduly prolonged. The court of appeals carefully balanced these factors and properly concluded that the United States is an indispensable party in the circumstances of this case.⁵ That balance does not reflect an "assumption that if someone has to suffer, it may as well be the Indians" (Pet. 14). It reflects, rather, a principle crucial to our judicial system, "found and approved in all systems of enlightened jurisprudence," which is simply

⁵ The court of appeals did not hold nor do we suggest that the United States is an indispensable party to all suits brought by Indians under 25 U.S.C. 345. See *Mottaz*, slip op. 11 n.9.

that "the right to be free of stale claims in time comes to prevail over the right to prosecute them" (*Block v. North Dakota*, 461 U.S. at 287).⁶

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED

Solicitor General

ROGER J. MARZULLA

Acting Assistant Attorney General

EDWARD J. SHAWAKER

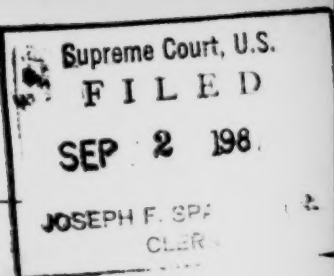
MARIA A. IIZUKA

Attorneys

AUGUST 1987

⁶ Petitioners also address the merits of their case (Pet. 17-19), contending that the fee patents were void ab initio because their issuance was conditioned both on prior application by allottees and individual determinations of competence by the Secretary of the Interior. Since, however, the court of appeals found it "unnecessary to resolve the legality of the forced fee patents * * * because the statute of limitations issue is dispositive" (Pet. App. 16), that issue is not properly presented for review. To the extent that petitioners are trying, without directly saying so, to revive their argument in the court of appeals (*id.* at 26-30) that no statute of limitations can bar their claims *because* the fee patents were void ab initio, that claim is untenable for the reasons given by the court of appeals. A similar argument was also rejected by this Court in an analogous context in *Mottaz* (slip op. 16-17).

(1)
No. 87-73



IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

Katherine B. NICHOLS, etc.,

Petitioners,

v.

Don RYSAVY, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONERS' REPLY BRIEF

Kim Jerome Gottschalk
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Attorney for Petitioners

August 1987

7002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....	(ii)
ARGUMENT.....	1
IF THE FEE PATENTS ISSUED BY THE SECRETARY WERE VOID, THE LAND IS STILL IN TRUST AND STATUTES OF LIMITATION DO NOT RUN.....	1
CONCLUSION.....	4

TABLE OF AUTHORITIES

Page(s)

CASES

Ewert v. Bluejacket, 259 U.S. 129 (1922)..3

Mottaz v. United States,
753 F.2d 71 (8th Cir. 1985),
rev'd on other grounds, 106
S.Ct. 2224 (1986).....2-3

United States v. Mottaz,
476 U.S. ___, 106 S.Ct. 2224 (1986)....2, 3

UNITED STATES STATUTES

28 U.S.C. § 2401(a).....2

28 U.S.C. § 2409a (Quiet Title Act).....2

28 U.S.C. § 2409a(f).....3

No. 87-73

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

Katherine B. NICHOLS, etc.,

Petitioners,

v.

Don RYSAVY, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

IF THE FEE PATENTS ISSUED BY THE
SECRETARY WERE VOID, THE LAND IS STILL
IN TRUST AND STATUTES OF LIMITATION DO
NOT RUN

Both the State of South Dakota and the
United States argue that the question of
whether any statute of limitations bars

these actions is unaffected by the voidness of the fee patents. Relying on United States v. Mottaz, 476 U.S. ___, 106 S.Ct. 2224 (1986), they claim that even if the fee patents were void, the statute of limitations runs (State's Brief in Opposition, p. 27; United States' Brief in Opposition, p. 13 n.6).

In that case, this Court held that an action against the United States to quiet title to allotted land purchased by the United States was barred by the Quiet Title Act, 28 U.S.C. § 2409a. The Eighth Circuit Court of Appeals had held that 28 U.S.C. § 2401(a) "does not bar claims of title to allotments because Ewert is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." Mottaz v. United

States, 753 F.2d 71, 73 (8th Cir. 1985),
rev'd on other grounds, 106 S.Ct. 2224.

The Court of Appeals relied on this Court's
decision in Ewert v. Bluejacket, 259 U.S.
129 (1922).

This Court ruled that the action
against the United States in Mottaz was
barred by the statute of limitations
contained in the Quiet Title Act, 28 U.S.C.
§ 2409a(f). Here, there is no attempt to
quiet title against the United States and
the policy considerations involved in
Mottaz do not apply. The Court then
specifically stated:

We need not reach the question
whether § 2401(a) applies to
claims brought under § 345 of the
General Allotment act, and, if it
does, when a cause of action
begins to run, since we conclude
that respondent cannot use § 345
for a quiet title action against
the Government.

106 S.Ct. at 2231.

Contrary to what the State and the federal government claim, the issue has been specifically reserved and is one for decision in this case. The Court of Appeals was in error to hold otherwise. App. p. 27.

CONCLUSION

This Court should grant certiorari to correct the opinion below.

Respectfully submitted,

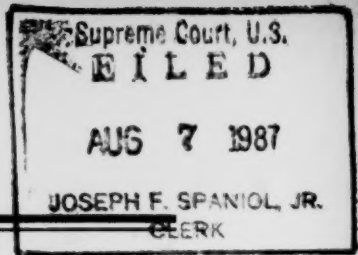
Kim Jerome Gottschalk
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Attorney for Petitioners

August 1987

No. 87-73

3



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

KATHERINE B. NICHOLS, *et al.*,
Petitioners,
v.
DON RYSAVY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE AND BRIEF OF
CHIGACO TITLE INSURANCE COMPANY,
FIRST AMERICAN TITLE INSURANCE COMPANY,
LAWYERS TITLE INSURANCE CORPORATION,
SAFECO TITLE INSURANCE COMPANY OF IDAHO,
STEWART TITLE GUARANTY COMPANY,
TICOR TITLE INSURANCE COMPANY,
TITLE INSURANCE COMPANY OF MINNESOTA,
TRANSAMERICA TITLE INSURANCE COMPANY,
AND
TITLE USA INSURANCE CORPORATION,
AS AMICI CURIAE IN OPPOSITION TO
PETITION FOR CERTIORARI

WILLIAM T. FINLEY, JR.
Counsel of Record
DAVID F. B. SMITH
KEVIN W. MCLEAN
PIERSON SEMMES AND FINLEY
1054 Thirty-first Street, N.W.
Washington, D.C. 20007
(202) 333-4000
Attorneys for Amici Curiae



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-73

KATHERINE B. NICHOLS, *et al.*,
Petitioners,
v.

DON RYSAVY, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE**

Nine title insurance companies, *viz.*, Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company of Idaho, Stewart Title Guaranty Company, Ticor Title Insurance Company, Title Insurance Company of Minnesota, Transamerica Title Insurance Company, and Title USA Insurance Corporation hereby respectfully move for leave to file the attached brief in opposition to the petition for a writ of certiorari in this case. Written consent to the filing of the attached brief was obtained from the attorney representing the petitioners and from nine of the attorneys representing various respondents, including the United States and the State of South Dakota. Copies of the consents that were received have been filed with the Clerk of this Court along with this motion and the attached brief. Written consents from the four attorneys representing the remaining respondents were requested, but

responses were not received. None of the attorneys denied consent.

The nine title insurance companies seeking to appear as amici curiae taken collectively have issued a large percentage of the title insurance in force throughout the western United States. Their principal function is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The interest of the nine title insurance companies in this case arises because of their interest in the certainty and predictability of the laws affecting titles to and rights in real estate. The position advanced by the petitioners in this case calls into question the validity of the title of current landholders to more than one million acres of land in the western United States. Petitioners contend that certain fee patents issued by the United States are void and therefore did not pass title to purchasers of the land subject to those patents. If the petitioners are successful, then the legitimate expectations of current landholders, who acquired their land in good faith, would be threatened. The nine title insurance companies seek leave to file the attached brief as amici curiae in order to address this potential threat to the titles of current landholders.

Respectfully submitted,

WILLIAM T. FINLEY, JR.

Counsel of Record

DAVID F. B. SMITH

KEVIN W. MCLEAN

PIERSON SEMMES AND FINLEY

1054 Thirty-first Street, N.W.

Washington, D.C. 20007

(202) 333-4000

Attorneys for Amici Curiae

August 7, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE APPLICATION OF 28 U.S.C. § 2401(a) DOES NOT MERIT REVIEW BY THIS COURT AND SECTION 2401(a) REQUIRES THE DISMISSAL OF THE CLAIMS AGAINST THE UNITED STATES	4
II. THE CLAIMS AGAINST THE CURRENT LANDHOLDERS SHOULD BE DISMISSED BECAUSE THE UNITED STATES IS AN IN- DISPENSABLE PARTY	5
A. The Determination of the Court Below that the United States Is an Indispensable Party Does Not Conflict With This Court's Deci- sions in <i>Poafpybitty</i> and <i>Hodel</i>	5
B. The Court of Appeals' Determination That the United States Is an Indispensable Party Was Correct	7
C. 25 U.S.C. § 345 Does Not Indicate That the United States Is Not an Indispensable Party to the Forced Fee Claims	13
III. THE ISSUANCE OF FORCED FEE PAT- ENTS WAS AUTHORIZED	14
A. Neither the Burke Act Nor the Constitution Required the Application or Consent of the Allottee to the Issuance of a Fee Patent in Order for the Fee Patent to Remove Restric- tions on Alienation Applicable to the Allot- ment	15
B. The Secretary of the Interior Acted Within His Authority in Determining the Compe- tency of Allottees Based on Blood Quantum..	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
<i>Antoine v. United States</i> , 637 F.2d 1177 (8th Cir. 1981)	14
<i>Arizona v. California</i> , 460 U.S. 605 (1983)	2
<i>Baker v. United States</i> , 276 F. 283 (8th Cir. 1921)	19, 20
<i>Begay v. Albers</i> , 721 F.2d 1274 (10th Cir. 1983)	13
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912)	16, 17
<i>Christensen v. United States</i> , 755 F.2d 705 (9th Cir. 1985)	5
<i>County of Mahnomen v. United States</i> , 319 U.S. 474 (1943)	18
<i>Fink v. Board of County Commissioners</i> , 248 U.S. 399 (1919)	17
<i>Heckman v. United States</i> , 224 U.S. 413 (1912)	7
<i>Hodel v. Irving</i> , — U.S. —, 107 S. Ct. 2076 (1987)	5-7
<i>Jones v. Prairie Oil & Gas Co.</i> , 273 U.S. 195 (1927)	17
<i>Loring v. United States</i> , 610 F.2d 649 (9th Cir. 1979)	5
<i>McKay v. Kalyton</i> , 204 U.S. 458 (1907)	14
<i>Minnesota Co. v. National Co.</i> , 70 U.S. (3 Wall.) 332 (1866)	2
<i>Moran v. Horsky</i> , 178 U.S. 205 (1900)	11
<i>Navajo Tribe of Indians v. New Mexico</i> , 809 F.2d 1455 (10th Cir. 1987)	12
<i>Nevada v. United States</i> , 463 U.S. 110 (1983)	2
<i>Poafpybitty v. Skelly Oil Co.</i> , 390 U.S. 365 (1968) ..	5, 6
<i>Provident Tradesmens Bank & Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	7, 8
<i>Puyallup Indian Tribe v. Port of Tacoma</i> , 717 F.2d 1251 (9th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1049 (1984)	12
<i>St. Louis Smelting & Refining Co. v. Kemp</i> , 104 U.S. 636 (1882)	10-12
<i>Steel v. St. Louis Smelting & Refining Co.</i> , 106 U.S. 447 (1882)	11
<i>United States v. Benewah County</i> , 290 F. 628 (9th Cir. 1923)	17

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Debell</i> , 227 F. 760 (8th Cir. 1915) ..	19, 20
<i>United States v. First National Bank</i> , 234 U.S. 245 (1914)	17, 19
<i>United States v. Frisbee</i> , 165 F. Supp. 883 (D. Mont. 1958)	18
<i>United States v. Glacier County</i> , 74 F. Supp. 745 (D. Mont. 1947)	18
<i>United States v. Mottaz</i> , 476 U.S. —, 106 S. Ct. 2224 (1986)	5, 13
<i>United States v. Schurz</i> , 102 U.S. 378 (1880)	11
<i>United States v. Title Insurance & Trust Co.</i> , 265 U.S. 472 (1924)	2
<i>United States v. Waller</i> , 243 U.S. 452 (1917)	17, 19
<i>Vicenti v. United States</i> , 470 F.2d 845 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973)	13
<i>Walters v. Secretary of Defense</i> , 725 F.2d 107 (D.C. Cir. 1983)	5
<i>Werner v. United States</i> , 188 F.2d 266 (9th Cir. 1951)	4, 5
<i>Williams v. Johnson</i> , 239 U.S. 414 (1915)	17

STATUTES:

Act of July 1, 1902, ch. 1361, 32 Stat. 636	16
Act of June 14, 1906, ch. 3298, 34 Stat. 262	16
Act of June 21, 1906, ch. 3504, 34 Stat. 325	16, 19
Act of June 28, 1906, ch. 3572, 34 Stat. 539	16
Act of May 27, 1908, ch. 199, 35 Stat. 312	16, 18
Act of June 25, 1910, ch. 431, 36 Stat. 855	16
Burke Act, Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1982))	2, 11, 12, 14-16, 18, 19
Indian Claims Limitation Act of 1982, Pub. L. 97- 394, 96 Stat. 1976 (1982)	5
25 U.S.C. § 345 (1982)	5, 13
25 U.S.C. § 352a (1982)	18
25 U.S.C. § 352b (1982)	18
28 U.S.C. § 2401 (a) (1982)	3-5

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:	Page
40 Cong. Rec. 3552-601 (1906)	15
Declaration of Policy issued by the Department of the Interior on April 17, 1917, <i>quoted in</i> J. Kinney, <i>A Continent Lost—A Civilization</i> <i>Won</i> (1937)	2
Fed. R. Civ. P. 19(b)	7, 8, 10
H.R. Rep. No. 1558, 59th Cong., 1st Sess. (1906)	15
H.R. Rep. No. 1896, 69th Cong., 2d Sess. (1927)	18
H.R. Rep. No. 2269, 71st Cong., 3d Sess. (1931)	18
<i>Indians of the United States, Investigation of the</i> <i>Field Service: Hearing by a Subcomm. of the</i> <i>House Comm. on Indian Affairs, 66th Cong., 3d</i> <i>Sess. (1920)</i>	2
Letter from the Commissioner of Indian Affairs to reservation superintendents (March 7, 1919), <i>quoted in</i> L. Schmeckebier, <i>The Office of Indian</i> <i>Affairs</i> (1927)	2
S. Rep. No. 1998, 59th Cong., 1st Sess. (1906)	15
Sup. Ct. R. 17.1	4, 8
Wright, Miller & Kane, <i>Federal Practice and Pro-</i> <i>cedure: Civil 2d</i> (1986)	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-73

KATHERINE B. NICHOLS, *et al.*,
v. *Petitioners*,
DON RYSAVY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE

INTEREST OF THE AMICI CURIAE

This brief is filed on behalf of nine title insurance companies¹ jointly appearing as amici curiae in this proceeding. The principal function of title insurance companies is to facilitate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The nine companies jointly appearing as amici curiae taken collectively have issued a large percentage of the title insurance in force throughout the western United States, and consequently have a direct interest in the stability of land titles in the region. This Court has long

¹ The nine companies are Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company of Idaho, Stewart Title Guaranty Company, Ticor Title Insurance Company, Title Insurance Company of Minnesota, Transamerica Title Insurance Company, and Title USA Insurance Corporation.

recognized the importance of such stability. *See, e.g., Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) (quoting *Minnesota Co. v. National Co.*, 70 U.S. (3 Wall.) 332, 334 (1866)); *Arizona v. California*, 460 U.S. 605, 620 (1983); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924).

At issue in this proceeding are fourteen forced fee claims asserted by the petitioners in the Western and Central Divisions of the District of South Dakota. These forced fee claims are based on a policy implemented by the Secretary of the Interior from 1916 to 1920 during the second term of President Woodrow Wilson. Using the authority provided by the Burke Act, Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1982)), which authorized the Secretary of the Interior to issue fee patents whenever he found that an Indian allottee was competent and capable of managing his affairs, the Secretary of the Interior issued fee patents to allottees he deemed competent regardless of whether the allottee had requested or applied for a fee patent. Officials of the Department of the Interior were directed to visit reservations and evaluate allottees individually to determine their competence.² The Secretary also issued fee patents to allottees of less than one-half Indian blood, and later to allottees of one-half Indian blood, without an individual determination of competency.³

The petitioners allege that they are successors in interest to allottees who received fee simple patents from the Department of the Interior during the 1916-20 period and subsequently transferred their lands or interests in

² *See Indians of the United States, Investigation of the Field Service: Hearings by a Subcomm. of the House Comm. on Indian Affairs*, 66th Cong., 3d Sess. 61-62, 74 (1920).

³ *See* "A Declaration of Policy," issued April 17, 1917 (quoted in J. Kinney, *A Continent Lost—A Civilization Won* 292 (1937)); Letter from the Commissioner of Indian Affairs to reservation superintendents, March 7, 1919 (quoted in L. Schmeckebier, *The Office of Indian Affairs* 153-54 (1927)).

their lands by sale or mortgage. They allege that the fee patents were issued by the Department in violation of constitutional and statutory requirements, and therefore that the patents were void and ineffective to pass title. As a consequence, they assert that the land should be returned to trust status under the control of the United States and that they are entitled to recover possession of the land covered by the fee patents, together with trespass damages for the time they were out of possession of the claimed land, despite the fact that the land covered by the patents is now held by innocent purchasers who acquired the land in good faith. Those purchasers include individuals, private entities, municipalities, and the State of South Dakota.

If the petitioners succeed in maintaining their claims against the current landholders, those landholders, who acquired their land in good faith with no notice of any defects in the fee patents issued by the United States Government more than sixty-five years ago, will lose their land. Moreover, many other landholders whose titles are traceable to the issuance of such fee patents could be threatened by other forced fee claims; the ownership of more than one million acres of land will be brought into question. Finally, if the petitioners' claims are upheld, purchasers of land covered by federal patents will not be able to rely on the validity of such instruments, even though they appear to be perfectly valid.

SUMMARY OF ARGUMENT

Petitioners have presented three questions for review by this Court: (1) whether the statute of limitations contained in 28 U.S.C. § 2401(a) applies; (2) whether the United States is an indispensable party to the forced fee claims; and (3) whether the forced fee patents are void. As this brief will demonstrate, none of these three questions warrants review by this Court. None of them involves conflicts either with prior decisions of this Court or with decisions of other courts of appeals. To the contrary, the determinations of the Court of Appeals below

are consistent with such decisions. Furthermore, the questions raised by petitioners are not important questions of federal law that have not been, but should be, settled by this Court. Finally, when the merits of the issues raised by the petitioners are examined, it is clear that the Eighth Circuit's determinations are correct.

ARGUMENT

I. THE APPLICATION OF 28 U.S.C. § 2401(a) DOES NOT MERIT REVIEW BY THIS COURT AND SECTION 2401(a) REQUIRES THE DISMISSAL OF THE CLAIMS AGAINST THE UNITED STATES

The application of section 2401(a) by the Court of Appeals below does not warrant review on a writ of certiorari. The decision represents a correct interpretation of a clearly-written statute and presents neither an important question of federal law nor a departure from "the accepted and usual course of judicial proceedings." Sup. Ct. R. 17.1(a). Moreover, the Eighth Circuit's determination that section 2401(a) applies is entirely consistent with the decisions of this Court and of other courts of appeals.

The petitioners contend that the statute of limitations contained in 28 U.S.C. § 2401(a) does not apply to their claims against the United States. Cert. Pet. at 20-21. Petitioners' contention is incorrect. Section 2401(a) provides that "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues"

The plain language of section 2401(a) shows that it applies to "every civil action." In addition, the petitioners' legislative history argument is erroneous and has been rejected by other courts of appeals. As the Ninth Circuit has held, section 2401(a) did not simply consolidate pre-existing statutes of limitations, "it also created a general statute of limitations insofar as suits

against the United States are concerned.” *Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951). *Accord Walters v. Secretary of Defense*, 725 F.2d 107, 113 (D.C. Cir. 1983). Finally, the Ninth Circuit has specifically considered the applicability of section 2401(a) to actions concerning allotments, and held that there is no escaping “the conclusion that section 2401(a) applies to *all* actions brought under section 345 [of title 25], whether the relief requested is legal or equitable.” *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir. 1985) (emphasis in original). *See also Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979). Thus, the six-year statute of limitations contained in section 2401(a) foreclosed the petitioners’ claims after 1954 (six years after the enactment of section 2401(a)).⁴

II. THE CLAIMS AGAINST THE CURRENT LAND-HOLDERS SHOULD BE DISMISSED BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY

A. The Determination of the Court Below That the United States Is an Indispensable Party Does Not Conflict With This Court’s Decision in *Poafpybitty* and *Hodel*

According to the petitioners, the Court of Appeals’ determination that the United States is an indispensable

⁴ Petitioners’ suggestion that the application of section 2401(a) to their claims would be inconsistent with the Indian Claims Limitation Act of 1982, Pub. L. 97-394, 96 Stat. 1976 (1982), is without merit and has already been answered by this Court’s decision in *United States v. Mottaz*, 476 U.S. —, 106 S. Ct. 2224 (1986). In *Mottaz*, this Court explained that the Indian Claims Limitation Act of 1982 tolls the statute of limitations for “many damages actions brought by the Federal Government” but that it is not applicable to actions *against* the federal government or to actions concerning the title to or possession of real property. *See* 106 S. Ct. at 2232 n.10 (emphasis in original). Inasmuch as the forced fee claims involve actions *against* (not by) the federal government and actions that seek the cancellation of patents and the return of possession of land (as well as damages), the applicability of section 2401(a) is not affected by the Indian Claims Limitation Act of 1982.

party conflicts with this Court's decisions in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), and *Hodel v. Irving*, — U.S. —, 107 S. Ct. 2076 (1987), which allegedly required the Court of Appeals “to give controlling weight to the policy of protecting allotments.” Cert. Pet. at 13. Petitioners’ arguments are without merit. *Poafpybitty* and *Hodel* are simply inapposite to the present case, which involves the indispensability of the United States to an action against non-federal defendants that is grounded upon alleged affirmative misconduct by the United States.

In *Poafpybitty*, the Court permitted Indian allottees who had executed an oil and gas lease that had been approved by the Acting Commissioner of Indian Affairs to bring an action against the lessee for the breach of the lease. The issue decided by the Court was not whether the United States was an indispensable party—an issue not even mentioned by the Court—but whether the restrictions that prevented an allottee from selling or leasing his land also prevented him from maintaining a legal action to protect his rights. See 390 U.S. at 372. The Court stated that both the United States and Indian allottees “were empowered to seek judicial relief to protect” allotments, *id.* at 369, and permitted the suit by the Indian allottees against their lessee to proceed.

There is no question that the petitioners in the forced fee claims were “empowered to seek judicial relief.” They clearly were. The pertinent questions concern the identity of the parties to a judicial proceeding in which such relief is sought and the time frame within which such relief may be sought. Unlike *Poafpybitty*, which involved allegations of misconduct by the lessee but no allegations of impropriety by the United States or its officers, the forced fee claims involve allegations of misconduct on the part of the United States only; there is no question of wrongdoing by the landholders against whom the petitioners are seeking to pursue their claims in the absence of the United States. In *Poafpybitty*, there was no rea-

son for the United States to be a party to the action—the Indian allottees had the power to bring the action and the conduct of the United States was not at issue.⁵

Similarly, *Hodel*, which involved a claim against the United States premised upon the alleged unconstitutionality of a federal statute, is irrelevant. In that case, this Court held that heirs of deceased allottees had standing to pursue claims against the Secretary of the Interior based upon the deprivation by the United States of the decedents' constitutional rights, and noted that the Secretary of the Interior "could hardly be expected to assert" those rights. 107 S. Ct. at 2081. That language has no bearing on the issue of whether the United States is an indispensable party in the context of the forced fee claims.

B. The Court of Appeals' Determination That the United States Is an Indispensable Party Was Correct

The Court of Appeals below properly analyzed the factors pertinent to whether the United States is an indispensable party. Rule 19(b) of the Federal Rules of Civil Procedure governs such determinations and sets forth four factors that courts are to consider. In evaluating these factors, the Court of Appeals followed the guidance provided by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), and affirmed the judgments of the district courts that the actions should not proceed without the United States. *Provident Tradesmens Bank* explained that the determination under Rule 19(b) of "whether, in equity and good conscience," an action should proceed without a party involves four interests:

First, the plaintiff has an interest in having a forum Second, the defendant may properly wish to

⁵ The petitioners' reliance on *Heckman v. United States*, 224 U.S. 413 (1912), is misplaced for similar reasons. *Heckman* involved an action challenging a subsequent transaction between the allottee and a purchaser rather than alleged misconduct on the part of the United States.

avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another

Third, there is the interest of the outsider whom it would have been desirable to join

Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

390 U.S. at 109-11.

The Eighth Circuit faithfully applied *Provident Tradesmens Bank* in reaching its decision below. Accordingly, the Eighth Circuit's decision does not constitute a decision on "an important question of federal law which has not been, but should be, settled by this Court," nor does it represent a departure from "the accepted and usual course of judicial proceedings" so as to justify review on a writ of certiorari. See Sup. Ct. R. 17.1. The application of Rule 19(b) in a particular case necessarily depends on the specific facts of that case, and both the Court of Appeals and the district court below carefully considered the specific facts and circumstances of the forced fee claims in reaching their decisions that the United States is an indispensable party. It would not be a wise use of the Court's certiorari power for the Court to engage in yet another review of the specific facts of the forced fee claims in the context of Rule 19(b).

Furthermore, when the four interests described by this Court in *Provident Tradesmens Bank* are evaluated, it is clear that the decision of the Court of Appeals below is correct. With respect to the first factor, the interest of the plaintiff in having a forum, it is true that the petitioners will have no forum in which to air their claims if the United States is held to be indispensable. This alone, however, does not preclude a finding that the United States is an indispensable party because Rule 19 does not require that this factor be given controlling weight. See generally, 7 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1608 (1986). Moreover, the reason that the petitioners would not have an

other forum is simply that they have waited too long to bring their claims. If they had brought them within the applicable period of limitations—*i.e.*, prior to 1954—they could have joined the United States in an action in a federal district court or could have brought an action against the United States in the Court of Claims to recover damages based on the allegedly wrongful issuance of the fee patents by the United States. Thus, the reason the petitioners have no other forum is not because no such forum ever existed, but because they did not avail themselves of the relief available within the prescribed statutory period.

With respect to the remaining three interests—the defendant's desire to avoid multiple litigation, inconsistent relief, or liability he shares with another, the interest of the outside party, and the goal of complete, consistent, and efficient settlement of controversies—the Court of Appeals below evaluated these interests properly in holding that they weighed heavily in favor of determining that the litigation should not proceed without the United States. The results sought by the petitioners—the cancellation of the fee patents at issue and return of the land to trust status under the control of the United States—clearly require the presence of the United States for a final and complete resolution of the controversy.

First, it would be unfair to subject the non-federal defendants to the risk of losing their property as a consequence of allegedly wrongful action engaged in solely by the United States, particularly when those defendants have no assurance of receiving any recovery against the United States in the event the forced fee claimants prevail against them. While the non-federal defendants may be able to pursue damage claims against the United States in the event that forced fee claimants prevail against them, the outcome of any such actions is uncertain. Apart from whatever other defenses the United States may have in such a proceeding brought by the non-federal defendants in the United States Claims Court, the United States would be free to relitigate before the Claims Court the issue of the validity of the forced fee

patents, since the United States would not be bound by a contrary determination made in litigation between the forced fee claimants and the non-federal defendants. This creates the possibility that a federal district court could determine that the United States acted illegally when it issued the forced fee patents, and impose ejectment or damages on the non-federal defendants, while the Claims Court could determine that the United States acted properly in issuing the forced fee patents and deny recovery against the United States, thereby forcing the non-federal defendants to bear the consequences of what one court determined to be the United States' wrongful conduct even though they were fully justified in relying on a federal fee patent as evidence of good title to the land. Rule 19(b) was developed to avoid precisely this sort of multiple litigation with its potential for inconsistent judicial determinations. To allow the instant claims to go forward in the absence of the United States raises the possibility that the non-federal defendants would bear all of the liability while the only alleged wrongdoer, the United States, escapes all liability.

Secondly, permitting these forced fee claims to proceed in the absence of the United States would contravene the longstanding doctrine barring collateral attacks on land or mineral patents issued by the federal government. This doctrine confirms that the United States is an indispensable party because it requires that attacks on the validity of federal patents be brought in direct proceedings against the United States. As this Court held in *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. 636 (1882), "a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land." 104 U.S. at 646. The protection afforded a federal patent is so strong that a patent may not be attacked in a court of law even if the officers issuing the patent "took mistaken views of the law." *Id.* at 647.

There is an exception to the general prohibition against collateral attacks for patents that are considered void. *See id.* at 641-45; *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. 447, 452-53 (1882). As the Court of Appeals below found, however, the alleged errors by the Secretary of the Interior render the forced fee patents “possibly voidable,” but not void. *Pet. App.* at 28-30. Inasmuch as that conclusion follows directly from the principles enunciated in decisions of this Court, the Eighth Circuit’s determination that the forced fee patents are not void does not warrant review on a writ of certiorari. Moreover, as will be discussed below at 14-20, the issuance of the forced fee patents was wholly consistent with both the Burke Act and the Constitution, and consequently forced fee patents are not even voidable, let alone void.

In finding the forced fee patents to be only “possibly voidable,” and not void, the Court of Appeals below applied long-standing principles of law that have been developed by this Court in decisions such as *Moran v. Horsky*, 178 U.S. 205 (1900), and *United States v. Schurz*, 102 U.S. 378 (1880). In *Moran*, this Court held that a patent was only voidable, not void, when no invalidity appears on the face of the patent or from matters subject to judicial notice, and the land covered by the patent is within the jurisdiction of the Land Department. *See* 178 U.S. at 212. Similarly, in *United States v. Schurz*, this Court stated that a patent is void only if the land is outside the jurisdiction of the government; otherwise the patent is merely voidable, even if the Land Department made errors in deciding questions of law or fact. *See* 102 U.S. at 400-01.

Application of these principles demonstrates that errors such as those alleged to be present in the issuance of the forced fee patents could not render such patents void, but only voidable. The Secretary of the Interior clearly had jurisdiction over the land for which the fee patents were issued to allottees and acted “within the scope of his authority” under the Burke Act when he issued those patents. The Burke Act explicitly author-

ized the Secretary to issue a fee patent "whenever he shall be satisfied" that an allottee was competent. While the Secretary may have made errors of judgment when he concluded that certain allottees were competent, such errors do not negate the Secretary's authority to issue fee patents under the Burke Act. Moreover, the alleged errors—issuing a patent absent an application or an individual determination of competency—could not possibly be apparent on the face of the patent. The proper remedy for correcting supposed errors of judgment is by a direct proceeding against the United States, not by a collateral attack against the titles of current landholders. Permitting such a collateral attack would destroy the "unassailable character" of the federal patents at issue, "a character which gives to [a patent] its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of lands it embraces." 104 U.S. at 641.⁶

⁶ The Eighth Circuit's decision is also supported by the recent decision of the Tenth Circuit in *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987). In *Navajo Tribe*, the tribe brought an action against the United States and other parties to affirm its title to certain unallotted lands. After upholding the dismissal of the action against the United States, 809 F.2d at 1464, the Court of Appeals held that the claims against the non-federal defendants must be dismissed because the United States was an indispensable party. The Tenth Circuit identified several factors that supported its conclusion, including: (1) that the claims were based on documents of title derived from the United States; (2) that the plaintiff sought to cancel all such instruments; and (3) the principle that all parties to an instrument must be present for an instrument to be cancelled. *Id.* at 1472. All of these factors are present in the context of the forced fee claims and similarly compel a finding that the United States is an indispensable party.

Also, as the Tenth Circuit stated in *Navajo Tribe*, cases such as *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), which have held the United States not to be an indispensable party in litigation concerning Indian lands, are inapposite because in those cases "the interest of the United States was aligned with that of the Indians." 809 F.2d at 1473. In contrast, in the forced fee claims, as in *Navajo Tribe*, the Indian claimants and the United States are adversaries.

C. 25 U.S.C. § 345 Does Not Indicate That the United States Is Not an Indispensable Party to the Forced Fee Claims

In *United States v. Mottaz*, 476 U.S. —, 106 S. Ct. 2224 (1986), this Court stated that the United States need not be a party defendant “in *all* cases brought under § 345 [which provides federal district courts with jurisdiction over actions concerning allotments] . . . because the United States would obviously not be a proper party in many private disputes.” 106 S. Ct. at 2231 n.9 (emphasis in original). It does not follow, however, from the Court’s statement that the United States is not indispensable in *all* section 345 cases, that the United States is not an indispensable party in this case. As the Court of Appeals below properly held, section 345 does not indicate that the United States is not an indispensable party with regard to the forced fee claims. Pet. App. at 38-39.

The essence of the plaintiffs’ claims in the forced fee cases is that the United States itself acted improperly in issuing fee patents. In contrast to the two cases cited by this Court in *Mottaz*, the forced fee cases do not involve claims of improprieties involved in the subsequent transfers to private landowners.⁷ While the United States

⁷ Neither of the two cases cited by this Court in *Mottaz* is instructive in the context of the forced fee claims. The first case, *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983), involved suits by two Indian allottees who alleged that their allotments had been transferred by means of forged deeds. The United States was a party to the actions along with the private landowners, originally as a party defendant, and subsequently as a plaintiff after it was realigned. The second case, *Vicenti v. United States*, 470 F.2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973), concerned an action brought by Indian allottees (or their descendants) against both the United States and private landowners. The plaintiffs alleged that they had never received certain lands in exchange for which they had surrendered their allotments. The private landowners settled the claims against them before trial, however, and the United States was the only defendant at the time of judgment. Since the private landowners had settled out before trial, the Tenth Circuit’s decision in *Vicenti* did not involve a dispute be-

may not be a necessary party in cases involving alleged improprieties in the transfer of land from an Indian allottee to another landowner, it is certainly a proper and necessary party in cases where the claim is bottomed on an assertion that the United States acted wrongfully in issuing a fee patent to an Indian allottee. See *McKay v. Kalyton*, 204 U.S. 458, 469 (1907) (United States must be made a party to controversies where the operation of legislation concerning allotments is at issue); *Antoine v. United States*, 637 F.2d 1177, 1181 (8th Cir. 1981) ("determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States").

Thus, while one can visualize numerous private disputes between Indian owners of allotments and private parties where involvement by the United States would not be indispensable or even appropriate—for example, when an Indian allottee sold land and did not receive the bargained-for consideration—the question presented in these proceedings is whether the forced fee claims constitute the kind of "private disputes" to which the United States would not be a proper party. The answer to that question is clearly negative. It would be inappropriate to resolve a dispute such as the forced fee claims, where the actions of the United States are the focus of the controversy, in the absence of the United States.

III. THE ISSUANCE OF FORCED FEE PATENTS WAS AUTHORIZED

The Court of Appeals below did not reach the merits of the forced fee claimants' challenge to the validity of the fee patents. The petitioners nevertheless contend that the Secretary of the Interior was not authorized by the Burke Act to issue fee patents without an application by the allottee and an individual determination of the allottee's competency, and that consequently such patents

tween Indian allottees and private landowners; the decision involved only a dispute between Indian allottees and the United States, and, of course, the United States was a party to the suit.

are void. Cert. Pet. at 17-19. When the merits are examined, however, it is clear that the forced fee claims have no basis and should be dismissed for that reason as well as by virtue of the statute of limitations and indispensable party grounds relied upon by the Court of Appeals.

A. Neither the Burke Act Nor the Constitution Required the Application or Consent of the Allottee to the Issuance of a Fee Patent in Order for the Fee Patent to Remove Restrictions on Alienation Applicable to the Allotment

As one of the district courts below held, Pet. App. at 68-81, the text of the Burke Act contains no requirement that a fee patent be issued only upon the application or with the consent of an Indian allottee. The relevant portion of the Act provides:

[T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple . . .

25 U.S.C. § 349 (1982). This language authorizes the Secretary of the Interior to issue a fee patent whenever he is satisfied that an allottee is competent and capable of managing his or her affairs. It contains no application or consent requirement.

The legislative history of the Burke Act contains nothing that contradicts the plain meaning of the statutory language. The House and Senate reports that accompanied passage of the Burke Act are virtually identical and give no indication that application or consent by the allottee was required. *See* H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906); S. Rep. No. 1998, 59th Cong., 1st Sess. 2 (1906). The floor debates accompanying passage of the Burke Act similarly provide no support for a consent requirement. *See* 40 Cong. Rec. 3552-601 (1906).

During the same period when the Burke Act was enacted, Congress passed several other acts authorizing the

issuance of fee patents (or in some cases certificates of competency, which, like fee patents, enabled allottees to sell their land) to allottees found by the Secretary of the Interior to be capable of managing their own affairs. Some of these acts contained requirements that an application for the fee patent or certificate of competency be filed⁸ while others did not.⁹ Some acts contained an application requirement for one class of Indians but not for other classes.¹⁰ Congress's decision to impose explicit application requirements in some of these acts but not in others, combined with its decision not to include an explicit application requirement in the Burke Act, supports the conclusion that Congress deliberately chose not to require an application under the Burke Act.

It is also clear that the Constitution does not require an allottee's consent for a fee patent to remove restrictions on alienation applicable to an allotment, although the allottee's consent may be required to terminate a tax exemption applicable to the allotment. In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court found that:

[T]he exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The right to remove the restriction was in pursuance of the power under

⁸ See, e.g., Act of June 25, 1910, ch. 431, 36 Stat. 855 (requiring application for certificate of competency); Act of June 28, 1906, ch. 3572, 34 Stat. 539 (requiring a request and petition for certificate of competency); Act of June 14, 1906, ch. 3298, 34 Stat. 262, 263 (requiring applications for fee patents for lands within drainage districts); Act of July 1, 1902, ch. 1361, 32 Stat. 636 (requiring request of Kaw Indians for certificate authorizing sale of lands).

⁹ See, e.g., Act of May 27, 1908, ch. 199, 35 Stat. 312 (allowing removal of restrictions on lands of Five Civilized Tribes); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 381 (allowing fee patents to be issued to Oneidas of Wisconsin). Some of the acts simply removed the restrictions on alienation by decree. See, e.g., Act of June 21, 1906, ch. 3504, 34 Stat. 325, 363 (decreeing removal of restrictions on lands of nonresident Kickapoo Indians).

¹⁰ See Act of June 21, 1906, ch. 3504, 34 Stat. 325, 353. The Clapp Amendment required applications by full-blood Indians but not by adult mixed-blood Indians.

which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant.

224 U.S. at 673 (emphasis added). Thus, while the tax exemption accompanying an allotment is a vested property right protected by the fifth amendment that cannot be terminated without the allottee's consent, *id.* at 674, restrictions on alienation are not property rights protected by the fifth amendment.

After *Choate*, this Court reaffirmed that restrictions on alienation and tax exemptions are distinct, and that while tax exemptions are protected property rights, restrictions on alienation are not. *See Williams v. Johnson*, 239 U.S. 414 (1915); *see also United States v. Benewah County*, 290 F. 628, 631 (9th Cir. 1923). In other decisions, this Court has repeatedly approved congressional removals of restrictions on alienation without the consent of the allottees.¹¹ These decisions make it manifestly clear that the unilateral removal of restrictions on alienation by Congress infringes no constitutional right of the allottees.¹²

¹¹ *See Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 199 (1927) (Justice Holmes held that "[i]t is not open to dispute that the removal . . . of the restriction upon alienation previously imposed, is valid"); *United States v. Waller*, 243 U.S. 452, 459-60 (1917); *see also Fink v. Board of County Comm'rs*, 248 U.S. 399, 404 (1919); *United States v. First Nat'l Bank*, 234 U.S. 245, 259 (1914).

¹² Assuming for the sake of argument that consent by the allottee to the removal of restrictions on alienation is required, subsequent consent—evidenced by the sale or mortgage by the allottee of the land covered by the patent—satisfies the consent requirement. Since no court has ever held that consent by the allottee is required in order to remove restrictions on alienation applicable to allotments, no court has ever considered directly what actions by the allottee satisfy such a consent requirement. This Court has considered a consent requirement in connection with the removal of tax exemptions applicable to allotments, however, and ruled that actions taken subsequent to the issuance of the fee patent can sup-

B. The Secretary of the Interior Acted Within His Authority in Determining the Competency of Allottees Based on Blood Quantum

The second major argument raised by the petitioners is that the fee patents are void because the Secretary of the Interior relied on factors such as the allottee's degree of Indian blood in making his determination whether to issue a fee patent, rather than making an "individual" determination of the allottee's competency. The text of the Burke Act, however, states simply that the Secretary is authorized to issue a fee patent "whenever he shall be satisfied" that an allottee is competent. The Act does not require an individual determination of competency, nor does it impose any other limitations on the Secretary's discretion in "satisfying" himself that an allottee was competent.

During the forced fee policy period Congress itself used degree of Indian blood as an indicator of competency,¹³

ply the requisite consent. See *County of Mahnomen v. United States*, 319 U.S. 474, 477-78 (1943); see also *United States v. Frisbee*, 165 F. Supp. 883, 889-91 (D. Mont. 1958); *United States v. Glacier County*, 74 F. Supp. 745, 749 (D. Mont. 1947). If an allottee can subsequently consent to the removal of a tax exemption covering an allotment, it follows that an allottee can subsequently consent to the removal of restrictions on alienation applicable to an allotment.

Congress has also viewed subsequent consent, as evidenced by actions such as the voluntary sale or mortgage of patented lands, as sufficient to satisfy any consent requirements. See 25 U.S.C. §§ 352a, 352b (1982); H.R. Rep. No. 1896, 69th Cong., 2d Sess. 2 (1927) ("[p]lacing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax-exempt privileges of a trust patent . . ."); H.R. Rep. No. 2269, 71st Cong., 3d Sess. 3 (1931) (where patented land "had been either mortgaged or sold by the Indian to whom the patent was issued, that such mortgage or sale, as the case might be, would amount to an acceptance of the patent and that he could not be heard to say that such patent had been improperly issued").

¹³ See Act of May 27, 1908, ch. 199, 35 Stat. 312 (distinguishing between lands held by individuals with varying degrees of Indian

and this Court upheld the practice. See *United States v. Waller*, 243 U.S. 452, 462 (1917); see also *United States v. First National Bank*, 234 U.S. 245 (1914). The decision in *Waller* demonstrates that the Department's mixed-blood policy under the Burke Act was within the Secretary's authority.

Petitioners rely on two decisions of the Eighth Circuit, *United States v. Debell*, 227 F. 760 (8th Cir. 1915), and *Baker v. United States*, 276 F. 283 (8th Cir. 1921), to support their argument that the Burke Act required an individual determination of competency. Cert. Pet. at 18-19. Apart from the fact that the Eighth Circuit itself did not view its decision in the instant case as in conflict with these prior decisions, the petitioners' reliance on these decisions is misplaced because neither holds that an individual determination of competency is necessary and both support the dismissal of the forced fee claims against the non-federal defendants.

In *Debell*, a decision that antedated the forced fee policy, the Eighth Circuit determined what constituted competency for purposes of the Burke Act, but did not address what procedural steps, if any, the Secretary of the Interior was required to use in order to determine competency. The fee patent at issue in *Debell*, which was predicated upon a competency determination based on fraudulent representations and upon a substantive competency standard that the court found erroneous as a matter of law, was subsequently transferred to an innocent purchaser who had no notice of these defects. The court ruled that the purchaser was protected by the bona fide purchaser doctrine and stated that

the United States and all parties claiming through or under [the patent] are thereby estopped from assailing the patent or the title under it as against such an innocent purchaser. The title of a bona fide purchaser

blood in establishing procedures for removal of restrictions on alienation); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 353 (requiring applications by full-blood Indians but not mixed-blood Indians for the removal of restrictions on alienation).

of land subsequent to the issue of the patent is superior to the equitable claim of the United States to avoid it for fraud or error of law in the issue of it.

227 F. at 763. The *Debell* court stated that the conveyance from the allottee to Debell, the party involved in the fraud, "was voidable, but it was not void because the United States had issued to [the allottee] its patent in fee simple." *Id.* at 771.

Baker, the other case relied upon by the petitioners, involved the issuance of fee patents to heirs of Indian allottees after competency determinations based upon fraudulent information. While the Eighth Circuit upheld the criminal convictions of the fraudulent parties, it also stated that the United States could recover the title to the lands only "if the title had not in the meantime passed into the hands of an innocent purchaser." 276 F. at 285.

Debell and *Baker* do not support the petitioners' assertion that erroneous competency determinations render fee patents void. These decisions instead support the Eighth Circuit's determination that the forced fee patents were at most voidable and that the forced fee claims should not be permitted to proceed against the non-federal defendants, who are innocent purchasers.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM T. FINLEY, JR.

Counsel of Record

DAVID F. B. SMITH

KEVIN W. MCLEAN

PIERSON SEMMES AND FINLEY

1054 Thirty-first Street, N.W.

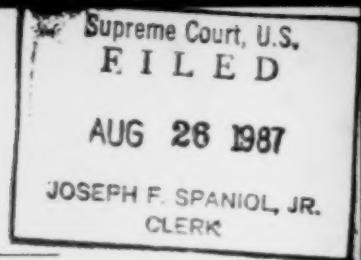
Washington, D.C. 20007

(202) 333-4000

Attorneys for Amici Curiae

August 7, 1987

5
No. 87-73



IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

Katherine B. NICHOLS, etc.,

Petitioners,

v.

Don RYSAVY, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICI CURIAE
OF THE ARAPAHOE TRIBE OF THE WIND RIVER
RESERVATION; BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION;
(additional amici on inside cover)
IN SUPPORT OF PETITIONERS

Jeanne S. Whiteing
Counsel of Record
2909 4th Street
Boulder, CO 80302
(303) 449-4926

Counsel for Amici Curiae

August 1987

23 PM

ADDITIONAL AMICI

Coeur D'Alene Tribe of the Coeur D'Alene
Reservation
Confederated Salish and Kootenai Tribes of
the Flathead Reservation
Confederated Tribes of the Colville
Reservation
Covelo Indian Community of the Round Valley
Reservation
Crow Tribe of Montana
Kalispel Indian Community of the Kalispel
Reservation
Klamath Tribe of Indians
Mescalero Apache Tribe of the Mescalero
Reservation
Oglala Sioux Tribe of the Pine Ridge
Reservation
Omaha Tribe of Nebraska
Rosebud Sioux Tribe
Santee Sioux Tribe of Nebraska
Seneca Nation of New York
Sisseton-Wahpeton Sioux Tribe
Spokane Tribe of the Spokane Reservation
Standing Rock Sioux Tribe of the Standing
Rock Reservation
Three Affiliated Tribes of the Fort
Berthold Reservation
Turtle Mountain Band of Chippewa Indians,
Turtle Mountain Indian Reservation
Winnebago Tribe of the Winnebago
Reservation of Nebraska

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	(ii)
INTEREST OF AMICI CURIAE.....	1
REASONS FOR GRANTING THE WRIT.....	6
I. THE CASE PRESENTS ISSUES OF GREAT IMPORTANCE TO MANY INDIAN TRIBES AND INDIVIDUALS.....	6
II. THE DECISION BELOW IS ERRONEOUS...	11
A. It Conflicts In Principle With Decisions Of This Court And With The Indian Claims Limitation Act.....	11
B. 25 U.S.C. §345 Does Not Require Joinder of the United States.....	15
III. THE ACTION OF THE SECRETARY OF THE INTERIOR IN FORCING FEE PATENTS ON ALLOTTEES WITHOUT DETERMINING THE COMPETENCY OF EACH ALLOTTEE WAS VOID AND - THEREFORE NO STATUTE OF LIMITATIONS APPLIES.....	16
CONCLUSION.....	17



No. 87-73

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

Katherine B. NICHOLS, etc.,

Petitioners,

v.

Don RYSAVY, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICI CURIAE
OF THE ARAPAHOE TRIBE OF THE WIND RIVER
RESERVATION; BLACKFEET TRIBE OF THE
BLACKFEET INDIAN RESERVATION;
(additional amici on inside cover)
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Written consent to the filing of this
brief was obtained from the petitioners'
attorney and from the respondents'
attorneys including the United States and

the State of South Dakota. None objected to the filing of this amici curiae brief. Copies of the consents that were received have been filed with the Clerk of this Court.

In 1887, Congress passed the General Allotment Act (Dawes Act), 24 Stat. 388 authorizing the issuance of allotments to individual Indians. That set in motion one of the most devastating policies ever inflicted on Native Americans. On dozens of reservations, including the reservations of most of the amici tribes, millions of acres of communal tribal land were allotted to individual Indians. "Surplus" lands were then made available for sale to non-Indians.^{1/}

^{1/} When the Act was passed, Indian land holdings amounted to approximately 138

-Continued-

Allotments were issued pursuant to the policy expressed in the General Allotment Act of 1887, 24 Stat. 388, on most of the reservations of the amici Indian tribes. Often, specific allotment statutes were enacted to implement the policy on the various reservations. See e.g., Sioux Allotment Act, 25 Stat. 888; Appropriations Act of June 30, 1919, 41 Stat. 3, 16 (allotment of Blackfeet Reservation). The allotments were to be held in trust for twenty-five years and for such additional time as the President should provide. The

1/ -Continued-

million acres. By 1934, that area was reduced to approximately 48 million acres. Of the nearly 90 million acres lost, approximately sixty million acres were sold or ceded as surplus. The other thirty million acres lost represented land passing from the transfer of individual allotments. F. Cohen, Handbook of Federal Law, (2d ed. 1982) at 138. Of that amount approximately 1.5 million acres was land affected by the forced fee patent policy at issue in these cases. Petition for Certiorari p. 10.

trust period of many of these allotments was cut short by the Secretary of the Interior through the issuance of fee patents. These fee patents were purportedly issued pursuant to the Burke Act, 34 Stat. 182, which authorized the Secretary of the Interior to issue a fee patent to an allottee "competent and capable of managing his or her affairs." But many fee patents were issued without applications therefor and without making individual determinations of an allottee's competency to manage his or her affairs. Many of the allottees were not competent to manage their affairs and lost their lands as a result.

The loss of allotted lands has had a profound impact on many of the amici tribes, causing their reservations to be checkerboarded with "non-trust" land and

depriving their members of crucial resources and the means of maintaining their livelihoods. The Tribes have a vital interest in seeing the allotments returned to their rightful Indian owners.^{2/}

In addition, all of the amici have continuing relationships with the United States and are concerned about the holding of the court below that the United States is an indispensable party to actions to recover trust land from third parties where the federal government was involved in some way in the loss of the land. While the

^{2/}Amici have approximately 6,500 forced fees listed on their reservations. The Blackfeet Tribe has over 800 claims, the Confederated Salish and Kootenai Tribes has nearly 800 claims on its reservation, the Crow Tribe, the Oglala Sioux Tribe and the Rosebud Sioux Tribe all have over 600 claims and other amici likewise have such claims numbering in the hundreds. See 48 Fed. Reg. 13697-13920 (Mar. 31, 1983); 48 Fed. Reg. 51204-51268 (Nov. 7, 1983).

holding below involves only allottees, it has the potential of severely undermining the ability of amici to protect their assets, and certainly it directly impacts the ability of the members of amici Tribes to protect their property.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS ISSUES OF GREAT IMPORTANCE TO MANY INDIAN TRIBES AND INDIVIDUALS

At stake in this case is the ability of tribes and individual Indians to protect their property rights where the federal government has refused or neglected to do so. More specifically, literally thousands of forced fee patent claims involving over 1.5 millions of acres are at stake in the case.

In 1966, Congress passed 28 U.S.C. §2415 to provide a six-year statute of limitations on certain actions brought by

the United States. As 1972 approached, the government became concerned that significant claims which the United States could bring on behalf of Indians would be lost. An extension of the limitations period was sought and received and a program was begun to identify claims which the United States could bring on behalf of Indians. Thousands of claims were identified and additional extensions were sought so that the identification process could be completed. The last extension, the Indian Claims Limitation Act of 1982, 96 Stat. 1976, provides for the listing of all identified claims in the Federal Register. Forced fee claims represent one of the largest categories of claims.

More than seventy tribes have members who have forced fee patent claims on the lists published in the Federal Register. Several others have claims listed which are

characterized by terms such as "questionable ~~cancellation~~ of patent" and probably represent forced fee claims. Over 9,400 of the claims listed in the Federal Register are forced fee claims. More than 1,100 claims are listed under different headings but appear to be forced fee patents. See lists at 48 Fed.Reg. 13697-13920 (March 31, 1983) and 48 Fed.Reg. 51204-51268 (Nov. 7, 1983).

Forced fee claims are listed from the Seventh, Eighth, Ninth, and Tenth Circuits and from at least thirteen states in the west and midwest. Approximately 1.5 million acres of land were lost by Indians because of the forced fee policy. This land is now viewed as non-trust land by the BIA. The non-trust status of the land complicates tribal governmental control over the land. The loss of land by

individual tribal members puts additional strain on limited tribal resources.

The forced fee policy had a devastating effect on thousands of Indian allottees and their tribes. The effects continue to be felt to this day. But the impact of the decision below extends far beyond forced fee cases. It arguably extends to every claim in which there is federal wrongdoing. That may include virtually all of the thousands of claims of whatever type listed in the Federal Register. See description of claims in Covelo Indian Community v. Watt, 551 F.Supp. 366, 370-73 (D.D.C. 1982).^{3/} The Eighth Circuit

^{3/} These claims are of several types. Secretarial transfer claims of the type involved in United States v. Mottaz, 476 U.S. ____, 106 S.Ct. 2224 (1986) clearly

-Continued-

Court of Appeals' holding that the United States is an indispensable party to actions to recover property lost to third parties through federal action prevents Indians and possibly tribes (see f.n. 4, infra) from

3/ -Continued-

involve federal complicity. In secretarial transfer cases, sales of inherited allotments on reservations were approved by BIA officials without the consents of all beneficial heirs as allegedly required by 25 U.S.C. §483. Thousands of unapproved rights of way claims are listed, at least some of which were accomplished with the assistance of the BIA. Covelo, 551 F.Supp. at 373. Over 1,600 age old assistance claims are listed. States and local subdivisions were paid by the BIA from the trust accounts of deceased Indians because of state old age assistance rendered to those deceased Indians. This is one of the categories of claims Congress has agreed to resolve. See 25 U.S.C. §2301 et seq. Another class of claims involving federal complicity which Congress has addressed by legislation is the loss of trust land on the White Earth Reservation in Minnesota. See White Earth Reservation Land Settlement Act of 1985, 100 Stat. 61. One would be hard-pressed to identify a category of claims in which the federal government is not implicated.

protecting their property. The Indians are left totally at the mercy of the United States to represent them in cases where there is federal wrongdoing. But the United States refuses to represent them. See Covelo Indian Community v. Watt, 551 F.Supp. 366 (D.D.C. 1982). It is ironic that the Indians would be barred from protecting their own property interests in the very circumstances where that protection is most vital, i.e., where the injury is the result of federal policies and federal actions.

II. THE DECISION BELOW IS ERRONEOUS

A. It Conflicts In Principle With Decisions Of This Court And With The Indian Claims Limitation Act

The law is unanimous that where Indian or tribal interests are not adverse to those of the United States, the United States is not an indispensable party to an action by an Indian or Tribe against a

third party to recover trust land. See cases collected in Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049, reh'g denied, 466 U.S. 954. However, the Eighth Circuit opinion below and a Tenth Circuit opinion rendered on the same day, Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455 (10th Cir. 1987) have held that where a tribe or allottee has a claim against a third party in which the federal government is implicated, the United States is an indispensable party if its interests are not aligned with those of the Indians. Thus, rather than allow a tribe or allottee to protect its property against a non-Indian where the United States is at odds with the Indian, the Indians are simply left without a remedy.

This result is inconsistent with this Court's decision in Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968), in which this Court held that allottees had standing to sue for breach of an oil and gas lease. The ". . . dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." 390 U.S. at 369. See also Hodel v. Irving, ____ U.S. ____, 107 S.Ct. 2076 (1987) (heirs to interests in allotments made under the Sioux Allotment Act had standing to bring descendants' claims where the Secretary of the Interior was unlikely to bring them since they turned on a claim that a federal statute is unconstitutional.)

Congress intended, with the passage of the Indian Claims Limitation Act, "to give

the Indians one last opportunity to file suits covered by [28 U.S.C.] §2415(a) and (b) on their own behalf." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 244 (1985). It is especially unjust that the decision below prevents the Indians from taking advantage of the Indian Claims Limitation Act. The Eighth Circuit's decision means that the claims are preserved only if the federal government chooses to bring them.^{4/}

^{4/} The decision below does not involve and does not address whether Indian tribes rather than individual allottees, may bring similar claims under 28 U.S.C. §1362 (original jurisdiction in civil actions brought by Indian tribes), without the presence of the United States. Cf. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (§1362 was intended by Congress to permit tribes to sue under the same rules that would apply if the United States had sued on their behalf). But see Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455 (10th Cir. 1987).

B. 25 U.S.C. §345 Does Not Require Joinder of the United States

These actions were brought under 25 U.S.C. §345 which provides jurisdiction over actions to recover allotments. United States v. Mottaz, 476 U.S. _____, 106 S.Ct. 2224 (1986). The Court said:

To hold that in all cases brought under §345 the United States must be named as a party defendant would restrict access to federal courts afforded Indians raising claims or defenses involving their land entitlements because the United States would obviously not be a proper party in many private disputes that related to land claims originally granted by various allotment acts.

106 S.Ct. at 2231. Thus, there is no requirement to join the United States in such actions and it was error for the lower court to require such joinder. This Court should grant certiorari to review the decision of the Eighth Circuit and establish a uniform national rule on the crucial issue of indispensability.

III. THE ACTION OF THE SECRETARY OF THE INTERIOR IN FORCING FEE PATENTS ON ALLOTTEES WITHOUT DETERMINING THE COMPETENCY OF EACH ALLOTTEE WAS VOID AND THEREFORE NO STATUTE OF LIMITATIONS APPLIES

The Burke Act expressly conditioned the authority of the Secretary of the Interior on making a determination of each allottee's competency. Cf. United States v. Debell, 227 F. 760 (8th Cir. 1915). In issuing fee patents based on blood quantum, (a policy initiated after the Debell case) the Secretary acted outside the scope of his authority and his actions were void ab initio. The land is thus still in trust. The Court of Appeals erred in holding that the fee patents were merely voidable and not void.

The Indian Claims Limitations Act, 96 Stat. 1976, makes clear the time has not run on an action to recover the land from third parties. And if the fee patents were void, 28 U.S.C. §2401 would not apply even

if it is assumed arguendo that the United States is an indispensable party. Mottaz v. United States, 753 F.2d 71 (8th Cir. 1985), rev'd on other grounds, 106 S.Ct. 2224 (1986).

CONCLUSION

The Court should grant certiorari to correct the erroneous decision of the Court of Appeals that the United States is an indispensable party in actions to recover trust lands and to correct the erroneous interpretation of the Burke Act by the Court of Appeals.

Respectfully submitted,

Jeanne S. Whiteing
Counsel of Record
2909 4th Street
Boulder, CO 80302
(303) 449-4926

Counsel for Amici Curiae

August 1987

AUG 24 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

KATHERINE B. NICHOLS, etc.,

Petitioners,

—v.—

DON RYSAVY, *et al.*,

Respondents.

**MOTION FOR LEAVE TO FILE AND BRIEF OF MARVIN MAYPENNY,
MARGARET NORCROSS, WINONA LADUKE, EDNA EMERSON LITTLE-
WOLF, AUGUSTUS BROWN, SERAPHINE MARTIN AND ANISHINABE
AKEENG AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR
CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

*MICHAEL RATNER
MAHLON F. PERKINS
FRANK E. DEALE
CENTER FOR CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6427

KURT V. BLUEDOG, ESQ.
5275 Edina Industrial Boulevard
Edina, Minnesota 55435
(612) 893-1813

ALAN J. WEINSCHL
R. BRUCE RICH
STEVEN C. SCHWARTZ
MELISSA SALTEN

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022
(212) 310-8403

* Counsel of Record for
Amici Curiae

3214

B18702

NO. 87-73

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

Katherine B. NICHOLS, etc.,
Petitioners,
v.
Don RYSAVY, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE

MARVIN MANYPENNY, MARGARET NORCROSS,
WINONA LADUKE, EDNA EMERSON LITTLEWOLF,
AUGUSTUS BROWN, SERAPHINE MARTIN and
ANISHINABE AKEENG hereby respectfully move
for leave to file the attached brief as
amici curiae in this case. The consent of
the various counsel for petitioners was
sought, however, due to the large number
of parties to the present action, and the

reluctance of any one to speak for all, consent of all counsel has not yet been obtained.¹ Consent letters from the office of the Solicitor General, the Attorney General of the State of South Dakota and Counsel for petitioners, have been obtained and have been forwarded to the Clerk of the Court under separate cover.

The interest of amici arise from the fact that they are enrolled members of the White Earth Band of Indians of Minnesota and members of Anishinabe Akeeng, an organization of White Earth Indians whose purpose is to promote the return of formerly White Earth lands to Indian ownership. Three of the named amici are presently among the plaintiffs in Manypenny v. United States, Civ. No. 4-86-

¹According to the Petition for Certiorari, there are 28 named parties to this action. See Petition at ii.

770, a civil action brought in United States District Court for the District of Minnesota to obtain damages and quiet title to allotted lands which were forfeited and transferred by allottees in violation of the restrictions of the trust patent allotments. The Eighth Circuit's holding in Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), that the United States is an indispensable party in a suit by Indians to quiet title to trust land held by third parties, casts a shadow on the claims of the amici who are plaintiffs in Manypenny. As the Manypenny case falls within the jurisdiction of the Eighth Circuit, the interests of amici in Supreme Court review of the Nichols case is both real and substantial. Amici Edna Emerson Littlewolf, Augustus Brown, Seraphine Martin and Anishinabe Akeeng are plaintiffs in Littlewolf v. Hodel, Civ. No. 87-0822, a civil action filed in the

U.S. District Court for the District of Columbia Circuit challenging the constitutionality of the White Earth legislation. Their case may also turn on this Court's review of the Eighth Circuit decision.

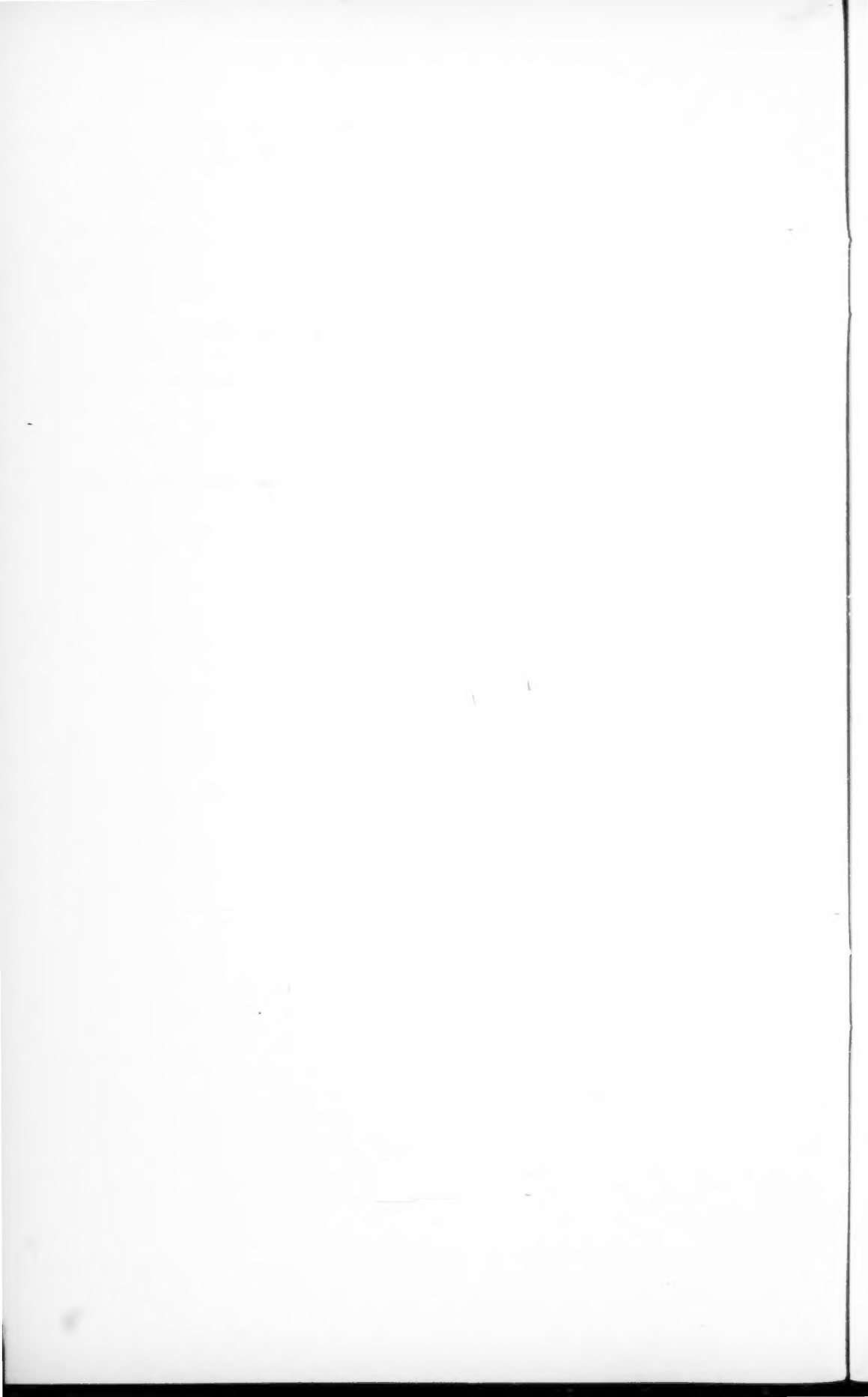
In the instant case, it is believed that the argument contained in the brief submitted by amici will assist in establishing that the decision of the Eighth Circuit in Nichols is seriously flawed, that correction by this Court is essential, and that this issue is substantial. If this argument is accepted, it would be dispositive of the case.

Respectfully submitted,

* MICHAEL RATNER
MAHLON PERKINS
FRANK E. DEALE
Center for Constitutional
Rights
666 Broadway, 7th Fl.
New York, NY 10012
(212) 614-6464

KURT V. BLUEDOG, ESQ.
5275 Edina Industrial
Blvd.
Edina, MN 55435
(212) 893-1813

ALAN J. WEINSCHL
R. BRUCE RICH
STEVEN C. SCHWARTZ
MELISSA SALTEN
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10022
(212) 318-8170
ATTORNEYS FOR AMICI CURIAE
*Counsel of Record



NO. 87-73

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

Katherine B. NICHOLS, etc.,
Petitioners,

v.

Don RYSAVY, et al.,
Respondents.

BRIEF OF MARVIN MANYPENNY, MARGARET
NORCROSS, WINONA LADUKE, EDNA EMERSON
LITTLEWOLF, AUGUSTUS BROWN, SERAPHINE
MARTIN AND ANISHINABE AKEENG AS AMICI
CURIAE IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief Amici Curiae in support of the
petition for certiorari seeking review of
the decision of the Court of Appeals for
the Eighth Circuit in Nichols v. Rysavy,
809 F.2d 1317 (1987).

Interest of Amici

The amici are six enrolled members of the White Earth Band of Indians of Minnesota and Anishinabe Akeeng (The People's Land), an organization of White Earth Indians having the purpose of returning lands within the White Earth Reservation to Indian ownership. The individual amici and the members of Anishinabe Akeeng are allottees or heirs of allottees who have claims to land within the Reservation now held by others as the result of forfeitures and transfers of title that violated the restrictions of the trust patents for the allotments. Marvin Manypenny, Margaret Norcross and Winona LaDuke are among the plaintiffs in an action brought in the District Court for Minnesota to quiet title to allotted trust lands and obtain damages and other relief (Manypenny, et

al., v. United States, et al., Civil No. 4-86-770. Amici Edna Emerson Littlewolf, Augustus Brown, Seraphine Martin and Anishinabe Akeeng are plaintiffs in Littlewolf v. Hodel, Civ. No. 87-0822, a civil action filed in the U.S. District Court for the District of Columbia Circuit challenging the constitutionality of the White Earth legislation. The holding in Nichols that the United States is an indispensable party in a suit by Indians to quiet title to trust land held by third parties casts a shadow on the claims asserted by the amici who are plaintiffs in Manypenny and on the parallel claims which the amici who are plaintiffs in Littlewolf seek to preserve from extinction on their own behalf and on behalf of a class of thousands of other White Earth Indians. All of these claims must be brought in the District Court for Minnesota and therefore are subject to the jurisprudence of the Eighth Circuit.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	v
REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	2
I. SINCE IT IS CLEARLY ESTABLISHED THAT INDIANS MAY SUE ON THEIR OWN BEHALF TO PROTECT OR RECOVER TRUST LANDS, THE UNITED STATES IS NOT AN INDIS- PENSABLE PARTY TO SUITS BY INDIANS TO PROTECT OR RECOVER TRUST LANDS..	2
1. Indians May Sue On Their Own Behalf To Protect Or Re- cover Trust Lands.....	2
2. The United States Is Not An Indispensable Party To Suits By Indians To Protect Or Recover Trust Lands.....	4
II. THE DECISION BELOW IS BOTH WRONG AND UNJUST.....	11
CONCLUSION.....	17

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Antoine v. United States,</u> 637 F.2d 1177 (8th Cir. 1981).....	14, 15
<u>Bird Bear v. McLean, 513</u> F.2d 190 (8th Cir. 1975)....	8
<u>Chocktaw and Chicksaw Nations</u> <u>v. Seitz, 193 F.2d 456</u> <u>(10th Cir. 1951), cert.</u> <u>denied, 343 U.S. 919</u> <u>(1952).....</u>	5, 6 7
<u>Ewert v. Bluejacket, 259 U.S.</u> 129 (1922).....	3, 4 5, 14
<u>Fort Mojave Tribe v.</u> <u>LaFollette, 478 F.2d</u> <u>1016 (9th Cir. 1973).....</u>	8
<u>Heckman v. United States,</u> 224 U.S. 413 (1912).....	3, 4 5
<u>Jackson v. Sims, 201 F.2d</u> 259 (10th Cir. 1953).....	7, 8 14
<u>Mashpee Tribe v. New Seabury</u> <u>Corp., 427 F. Supp.</u> 899 (D. Mass. 1977).....	9
<u>Manypenny v. United States,</u> Civ. No. 87-0822.....	ii, iii

<u>Narragansett Tribe of Indians</u> <u>v. Southern Rhode Island</u> <u>Land Development Corp.</u> 418 F. Supp. 798 (D.R.I. 1976).....	9
<u>Nichols v. Rysavy</u> , 809 F.2d 1317 (8th Cir. 1987).....	i, iii, 2, 15
<u>Oneida Indian Nation of New</u> <u>York v. County of Oneida</u> , 434 F. Supp. 527 (N.D.N.Y. 1977).....	8, 9
<u>Oneida Indian Nation of</u> <u>New York v. County of</u> <u>Oneida</u> , 719 F.2d 525 (2d Cir. 1983), <u>aff'd.</u> <u>as to liability</u> , U.S. ___, 105 S.Ct. 1245 (1985).....	15
<u>Poafpybitty v. Skelly Oil Co.</u> , 390 U.S. 365 (1968).....	3, 4
<u>Puyallup Indian Tribe v. Port</u> <u>of Tacoma</u> , 717 F.2d 1251 (9th Cir. 1983), <u>cert. denied</u> , 465 U.S. 1049 (1984).....	8
<u>Skokomish Indian Tribe v.</u> <u>France</u> , 269 F.2d 555 (9th Cir. 1959).....	8
<u>United States v. Mottaz</u> , __ U.S. ___, 106 S.Ct. 2224 (1986).....	9, 10
<u>Vicenti v. United States</u> , 470 F.2d 845 (10th Cir. 1972), <u>cert. dismissed</u> , 414 U.S. (1973).....	10, 11 13, 14

Statutes

25 U.S.C. sec. 349.....	12
28 U.S.C. sec. 345.....	9, 10

Other Authorities

3A <u>Moore's Federal Practice,</u> <u>¶19.09[8] (2d ed. 1986).....</u>	9
--	---



REASONS FOR GRANTING THE WRIT
AND SUMMARY OF ARGUMENT

The decision of the Court of Appeals that the United States is an indispensable party in suits by Indians to recover trust or restricted lands from third parties, where the loss of the land resulted from unauthorized acts of the federal government, flies in the face of long established law, conflicts with decisions of this Court and the courts of other circuits, and deals a death blow to the claims of untold thousands of Indians who have suffered injury at the hands of a government which holds itself out as a fiduciary for its Indian wards. Review by this Court is urgent.¹

¹In focusing on the indispensable party issue, we do not imply any lack of support for the other grounds for review urged in the Petition.

The argument will first examine the capacity of Indians to sue on their own behalf to protect or recover trust lands, and will then discuss the cases which establish that the United States is not an indispensable party to such suits brought against third parties. It will differentiate the situations where the United States is an indispensable party, and conclude with an analysis of the Nichols case.

ARGUMENT

I. SINCE IT IS CLEARLY ESTABLISHED THAT INDIANS MAY SUE ON THEIR OWN BEHALF TO PROTECT OR RECOVER TRUST LANDS, THE UNITED STATES IS NOT AN INDISPENSABLE PARTY TO SUITS BY INDIANS TO PROTECT OR RECOVER TRUST LANDS

1. Indians May Sue On Their Own
Behalf To Protect Or Recover
Trust Lands

As early as 1912 this Court, in upholding the authority of the federal government to bring suit to cancel conveyances of allotted land made in

violation of restrictions on alienation, noted that the "allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct..." Heckman v. United States, 224 U.S. 413, 446 (1912). Ten years later the Court implicitly recognized this right in Ewert v. Bluejacket, 259 U.S. 129 (1922), a suit by the heirs of an allottee to invalidate their ancestor's sale of restricted land to a "person employed in Indian affairs."

More recently, in Poafpybitty v. Skelly Oil Company, 390 U.S. 365 (1968), this Court unanimously rejected a challenge to the standing of Comanche Indians to bring a suit in the Oklahoma state court alleging breach of oil and gas leases of allotted lands, made with the approval of the Secretary of the Interior and subject to his supervisory authority. Beginning with the

implications of Heckman, the opinion canvassed the intervening decisions sustaining the capacity of restricted Indians to sue on their own behalf and concluded:

The existence of the power of the United States to sue upon a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment.

390 U.S. at 373-374

2. The United States Is Not An Indispensable Party To Suits By Indians To Protect Or Recover Trust Lands

In none of the cited cases, nor in any of the cases relied on by the Court in Poafpybitty, does the objection appear to have been made that the United States was an indispensable party. Although the illegal sale in Bluejacket had been approved by the Secretary of the Interior, the only issues treated in the

opinion are the application of the statutory prohibition to a special assistant to the Attorney General and the defense of laches. On the government's role in promoting the "grave mischief" sought to be prevented by the statute, the Court merely commented:

Any error by the department in their interpretation of the statute cannot confer legal rights inconsistent with its express terms.

259 U.S. at 138.

The first case that appears to have fully considered the question of the indispensability of the United States as a party is Chocktaw and Chickasaw Nations v. Seitz, 193 F.2d 456 (10th Cir. 1951), cert. denied, 343 U.S. 919 (1952), an action to recover tribal lands in which the United States was named as a third party but withheld its consent to be joined. Reviewing Heckman and other Supreme Court cases that had recognized

the right of Indians to maintain actions with respect to their lands, the court found that this Court's language clearly had reference to suits to which the United States was not a party, and reasoned that the Indians' right to sue would be "of no avail" to them if the United States were an indispensable party. 193 F.2d at 459-460. It acknowledged that the United States, if not joined, would not be bound by a judgment for the defendants, whose title would therefore remain under a cloud, but concluded:

We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder, weigh heavily in favor of the Nations.

193 F.2d at 461.

The following year, in Jackson v. Sims, 201 F.2d 259 (1953), the Tenth Circuit reaffirmed the holding of Chocktaw and Chicasaw Nations v. Seitz in an action to enjoin mining operations under a sublease of restricted land that had been approved by the Secretary of the Interior over the protest of a majority of the Indian owners. The court distinguished cases, such as condemnation suits, where the effect might be to alienate Indian land, from those where the effect

would protect Indian land against alienation, particularly where the Secretary refused, refrained or neglected to protect the Indian's interest. Here, the suit is on behalf of the Indians to protect the title to the Indian lands against an attempted alienation with the approval of the Secretary. If Section 2 of the 1939 Act is construed to prohibit the subleasing without the consent of a majority of the Indian owners, approval of the same by the Secretary is beyond his statutory authority and no governmental function

would be impaired by granting the relief sought.

201 F.2d at 262.

Until the decision below, these two leading cases have been followed without exception in every Circuit where the indispensability of the United States has been raised as a defense in an action by Indians to protect or recover trust or restricted lands. Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1254-55 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984) (quiet title action, "rule is clear in this Circuit and elsewhere"); Bird Bear v. McLean County, 513 F.2d 190, 191, n.6 (8th Cir. 1975) (damages for trespass); Fort Mojave Tribe v. LaFollette, 478 F.2d 1016, 1017-18 (9th Cir. 1973) (quiet title action); Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (9th Cir. 1959) (quiet title action); Oneida Indian Nation of New York v. County of Oneida, 434 F.Supp.

527, 544-45 (N.D.N.Y. 1977) (damages for illegal use of aboriginal land); Mashpee Tribe v. New Seabury Corp., 427 F.Supp. 899, 903-04 (D. Mass. 1977) (recovery of aboriginal land); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F.Supp. 798, 809-13 (D.R.I. 1976) (recovery of aboriginal land); see 3A Moore's, Federal Practice, ¶19.09[8] at 19-195-96 (2d ed. 1986).

The rule was recently endorsed by this Court in United States v. Mottaz, 106 S.Ct. 2224 (1986). In holding that the waiver of immunity granted by 28 U.S.C. §345 extended only to suits seeking an original allotment, the Court noted that §345 does confer jurisdiction on the federal courts to entertain suits by Indians to quiet title to land previously allotted. 106 S.Ct. at 2231, n.9. It went on to say:

To hold that in all cases brought under §345 the United States must be named as a party defendant would restrict the access to federal courts afforded Indians raising claims or defenses involving their land entitlements because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various allotment acts.

Id. The Court cited Vicenti v. United States, 470 F.2d 845 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973), as a case in which the Indian plaintiffs sought recovery of title from private parties though their suit for damages against the United States was held barred by sovereign immunity. In Vicenti, the plaintiffs alleged that the Bureau of Indian Affairs had prevailed on them or their predecessors to surrender their allotments in exchange for lands which they never received. The court of appeals noted the district court's expression of regret "that there was no

damage claim available to the appellants because either the Bureau of Indian Affairs, the Bureau of Land Management, or the Department of the Interior had allowed a 'cruel hoax' to be perpetrated against them." 470 F.2d at 847.

Thus, until the decision of the court below, it was settled law that the United States is not an indispensable party to suits by Indians to protect or recover trust or restricted lands. In only two classes of cases must the United States be joined: (1) suits to alienate such lands and (2) suits seeking an original allotment. The Nichols case does not fall into either of these classes.

II. THE DECISION BELOW IS BOTH WRONG AND UNJUST

The fourteen cases consolidated on appeal in Nichols were brought by the descendants of allottees who had lost their land through sale or foreclosure

after being issued fee simple patents in the years 1916-1921 by Secretary of the Interior Franklin K. Lane without having made an individual determination of the allottee's competency to manage his property and without having received an application therefore or the consent of the allottee - so-called "forced fee patents." Secretary Lane had purported to act under the authority of the Burke Act of 1906, 25 U.S.C. §349, but his successor in office discontinued the practice as violating the intent of the Act and releasing property from trust status without warrant of law.

In reaching its holding that the United States, which had refused to sue on behalf of the plaintiffs, was an indispensable party, the court of appeals noted that "if appellants prevailed in this suit, the United States would be reinstated as trustee over the land, with

the concomitant resumption of fiduciary responsibility, and could also be subject to claims for damages by the present owners." (Pet. App., p. 37) But reinstatement of the United States as trustee occurs in every successful suit by Indians to recover trust land; this reason would destroy the Indians' independent right to sue. And a judgment for the plaintiffs could not subject the government to liability, for, as recognized in all the cases permitting suit in its absence, it would not be bound by the judgment.

The court of appeals also argued that the result of the suit, if allowed to proceed to the merits, "would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy," and its liability cannot be "'tried behind its back.'" Id. But in

Bluejacket the government had approved an illegal sale of land; in Jackson v. Sims the government was alleged to have illegally approved a mining sublease; and in Vicenti, which the court of appeals describes as "sharply contrast[ing] with the present case," the government had perpetrated a "cruel hoax" on the Indian plaintiffs.

The factors stressed by the court of appeals do not differentiate this case from those in which it has been uniformly held that the United States is not an indispensable party. The only Indian case that the court cites in support of its position is Antoine v. United States, 637 F.2d 1177 (8th Cir. 1981). (Pet. App. p. 38) But, as the passage quoted from Antoine makes clear, the claim in that case was based on the government's original failure to issue a patent for allotted land and could only be decided

in a suit against the United States.

Antoine affords no precedent for Nichols.

In holding that the Nonintercourse Acts afford Indians a private right of action, the Court of Appeals for the Second Circuit said that private enforcement has been favored "because of the federal government's poor performance of its statutory obligation to protect the Indians." Oneida Indian Nation of New York v. Oneida County, 719 F.2d 525, 533 (2d Cir. 1983); aff'd as to liability, 105 S.Ct. 1245 (1985). When the injury to the Indians proceeds from the government's own malfeasance, when the United States itself has wrought a "grave mischief," the need for private enforcement becomes imperative. Yet this is the very circumstance that, according to the decision below, operates to take away that right. This is the apogee of injustice. The Indians' capacity to sue

on their own behalf to regain trust land
of which they have been illegally dispos-
sessed may not be so diminished.

CONCLUSION

For the forestated reasons the
petition for certiorari should be
granted.

Respectfully submitted,

*MICHAEL RATNER
MAHLON F. PERKINS
FRANK E. DEALE
Center for Constitutional
Rights
666 Broadway, 7th Fl.
New York, NY 10012
(212) 614-6464
ATTORNEYS FOR AMICI CURIAE

KURT V. BLUEDOG, ESQ.
5275 Edina Industrial
Blvd.
Edina, MN 55435
(212) 893-1813

ALAN J. WEINSCHL
R. BRUCE RICH
STEVEN C. SCHWARTZ
MELISSA SALTEN
Weil Gotshal & Manges
767 Fifth Avenue, 33rd fl.
New York, NY 10022
(212) 318-8170
* Counsel of Record

Dated: New York, New York
August 12, 1987